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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 558

THE ATLANTIC REFINING COMPANY, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

EDWARD F. HOWREY
HAROLD F. BAKER
TERRENCE C. SHEEHY
1707 H Street, Northwest
Washington, D. C. 20006
Attorneys for Petitioner

Of Counsel:

HOWREY, SIMON, BAKER & MURCHISON
1707 H Street, Northwest
Washington, D. C. 20006

ROY W. JOHNS
EDWARD J. KREMER, JR.
260 South Broad Street
Philadelphia, Pennsylvania 19101

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No.

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FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on April 12, 1965.

CITATION TO OPINION BELOW

The opinion of the court of appeals (App. A, *infra,* pp. 1a-15a)[1] is reported at 344 F. 2d 599.

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[1] Herein, "App." refers to the appendix printed *infra,* and "R." to the joint appendix certified by the court of appeals below.

JURISDICTION

The judgment of the court of appeals (App. A, *infra,* p. 15a) was entered on April 12, 1965; the court entered its final decree on May 3, 1965 (App. A, *infra,* p. 16a). The court of appeals extended the time for filing a petition for rehearing by order entered on April 28, 1965 (App. A, *infra,* p. 17a), and denied the petition for rehearing by order entered on June 14, 1965 (App. A, *infra,* p. 18a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Whether this Court in *Simpson* v. *Union Oil Co.,* 377 U.S. 13 (1964), overruled *United States* v. *General Electric Co.,* 272 U.S. 476 (1926), insofar as the retail marketing of gasoline is concerned.

(2) Whether the temporary employment by an oil company of bona fide consignment agreements with retail gasoline dealers for the purpose of assisting such dealers in price war situations, in the absence of use of coercive acts to obtain acceptance of such agreements, violates Section 5 of the Federal Trade Commission Act and is controlled by this Court's holding in *Simpson* v. *Union Oil Co., supra.*

(3) Whether, since petitioner employed consignment contracts in reliance upon their legality under *General Electric,* the court of appeals erred in refusing to consider whether equities warrant only prospective application of its interpretation of the *Simpson* holding in determining petitioner's liability.

(4) Whether an opinion and order concurred in by only two of the five Federal Trade Commission members is valid and enforceable.

STATUTE INVOLVED

The statutory provision involved is Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, which, in pertinent part, provides:

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

STATEMENT

This petition seeks review of the judgment of the Court of Appeals for the Sixth Circuit which affirmed an order of the Federal Trade Commission directing petitioner to cease and desist from violating Section 5 of the Federal Trade Commission Act.

Petitioner is engaged in the production, sale, and distribution of gasoline and other petroleum products in a seventeen state area. Retail gasoline price wars occur from time to time in petitioner's marketing area. Price war conditions are frequently such that petitioner's dealers cannot continue to buy gasoline at normal tank wagon prices and resell to consumers at prices competitive with other dealers of other suppliers without experiencing financial losses and probable extinction. Consequently, beginning in February of 1956, petitioner adopted a policy whereby, when price war conditions resulted in its dealers being unable to obtain a "living" margin (at least 4¢ per gallon), the dealers in such price war areas were offered assistance in the form of consignment contracts under which the dealer was guaranteed a minimum commission on each gallon of gasoline sold. This particular method of dealer assistance was adopted to avoid the pitfalls of the price discrimination provisions of the Robinson-Patman Act, 15 U.S.C. § 13(a).

In adopting this defensive consignment program, petitioner relied upon *United States* v. *General Electric Co.*, 272 U.S. 476 (1926).

On April 13, 1958, the commission issued a complaint (R. 1a-14a), charging in three counts that petitioner had violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by fixing and maintaining resale prices of gasoline in connection with a retail price war which occurred on the Delmarva Peninsula[2] in 1957.

Counts I and II of the complaint charged that petitioner coerced and pressured its retail service station dealers to accept consignment contracts. Count II charged that such consignment contracts were "nothing more than shams and subterfuges" for the fixing of retail gasoline prices. Count III, dealing with petitioner's relations with its wholesale gasoline distributors, charged a conspiracy between petitioner and its distributors in the Delmarva Peninsula to fix the prices at which gasoline was sold at the wholesale level, as well as at retail in the gasoline service stations owned and operated or sold to by said distributors.

After administrative hearings, a hearing examiner filed an initial decision (R. 24a-60a) in which he dismissed Counts I and II, finding that petitioner's consignment agreements created bona fide agency relationships, that petitioner retained title to gasoline in its agents' tanks, and that petitioner therefore had a legal right to control the prices at which its own

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[2] The Delmarva Peninsula comprises portions of the states of Delaware, Maryland and Virginia.

merchandise was sold to the consuming public.[3] The examiner relied on *United States* v. *General Electric Co., supra.* He held "that the respondent [petitioner] has utilized a legal method of procedure in meeting the competitive situation with which it was confronted in July, 1957 in the 'Delmarva Peninsula' in protecting its dealers from the price war that was prevalent in that area" (R. 54a). He further found that petitioner had not coerced its dealers into entering consignment contracts (R. 55a).

After hearing before the commission on cross appeals, an "Opinion of the Commission" (R. 66a-83a), written by Commissioner MacIntyre, was issued on May 16, 1963. This opinion noted that Commissioner Elman did "not concur" and that Commissioners Anderson and Higginbotham did not participate (R. 83a).[4] In this opinion, Commissioner MacIntyre (with the concurrence of only one other commissioner) reversed the hearing examiner's dismissal of Counts I and II, finding that petitioner's consignment contracts with its retail dealers violated Section 5 of the Federal Trade Commission Act.

While holding that "[d]oubtless the respondent [petitioner] felt that it had devised a consignment program valid in that it met all of the criteria of consignment as prescribed in the law of agency . . ."

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[3] As to Count III, the examiner found a violation and entered a tentative order. This finding was subsequently affirmed by the opinion of the commission.

[4] On June 10, 1963, petitioner moved for a "rehearing before the full Commission, sitting *en banc* . . ." on the ground that the opinion and order were issued by only two members of the five-member commission (R. 87a). The motion for rehearing was denied by order entered June 28, 1963 (R. 88a-89a).

(R. 79a), Commissioner MacIntyre distinguished the 1926 *General Electric* decision, ruling that petitioner "... attempted to make its dealers genuine agents, but the change made was merely of form and not of substance ..." (R. 78a), and that, since petitioner's program was "only used at irregular intervals and in certain markets during price wars," it was a "temporary" program as contrasted with General Electric's "permanently implemented and universally applied" system (R. 77a-78a). Although the opinion agreed that petitioner had not forced its dealers to enter consignment contracts, the two commissioners further held that petitioner was liable because price war conditions, which petitioner admittedly did not create, had made it advantageous for dealers to enter into the contracts. The opinion stated: "To the extent that the lessee-dealers had no alternative but economic death to entering a consignment-agreement with respondent [petitioner], it must be found that they were pressured or coerced to enter such contracts and the hearing examiner's finding to the contrary is in error. *However, there does not appear to be any evidence in this record that the respondent [petitioner] used its position of economic power over its lessee dealers to force them into entering the contract*" (R. 69a-70a; emphasis added).

Before the court of appeals, petitioner contended that its consignment agreements made bona fide agents of its retail gasoline dealers; that the type of "coercion" found by the commission, *i.e.*, economic "coercion" by reason of business conditions which petitioner did not create and had no power to prevent, was not the type with which this Court was concerned in *Simpson* v. *Union Oil Co., supra;* and that the fact

that petitioner's consignment program was a temporary and defensive one, utilized only to assist dealers in limited price war areas and not to control prices, distinguished the case from *Simpson.*

The court of appeals agreed with petitioner that the consignment agreements made bona fide agents of its retail dealers but held that *Simpson,* which was decided after the commission's opinion and order were entered, "decided the major question" in that this Court "limited the protection of such agreements . . . to situations where the protected consignment agreements pertained to products on which the consignor held patent rights" (App. A, p. 1a).[5] In affirming the commission's order, the court of appeals uncritically adopted the commission's theory of "coercion" and held the fact that petitioner utilized the consignment agreements only to assist dealers in price war conditions offered no basis for distinguishing the case from *Simpson.*

With respect to petitioner's contention that, assuming *Simpson* is controlling, the court should, in equity and fairness, decline to apply the holding retroactively since petitioner relied upon the legality of consignment selling as declared in *United States* v. *General Electric Co., supra,* the court of appeals held:

> Since the relief contemplated by this order consists of cease and desist orders which can be applied only prospectively after determination of their validity, we see no need to grapple now

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[5] In this same vein, the court of appeals stated that its problems with the issues presented "would be considerable" but for the fact that this Court in *Simpson* had overruled *General Electric* insofar as non-patented products are concerned (App. A, p. 1a).

with the question as to whether *Simpson* v. *Union Oil Co., supra,* should be applied retroactively (App. A, p. 15a).

Finally, with respect to petitioner's contention that an order concurred in by only two members of the commission is not valid or enforceable, the court of appeals held:

> The rules of the Federal Trade Commission since its inception have provided for decision by the majority of panels of three members [footnote omitted]. We believe this rule is within the Commission's power to make and is wholly valid. *Drath* v. *Federal Trade Commission,* 239 F. 2d 452 (C.A.D.C., 1956), *cert. denied,* 353 U.S. 917 (1957) (App. A, p. 14a).

REASONS FOR GRANTING THE WRIT

I. BECAUSE OF THE MAGNITUDE OF THE IMPACT UPON THE NATION'S PRIVATE ECONOMY, THE VAST NUMBER OF BUSINESS RELATIONSHIPS AFFECTED, AND THE CURRENT CONFUSION PLAGUING BUSINESS AND THE BAR, THE QUESTION WHETHER THIS COURT HAS OVERRULED UNITED STATES v. GENERAL ELECTRIC CO. REQUIRES A DEFINITIVE ANSWER

This case presents four-square the question: Does *Simpson* v. *Union Oil Co.,* 377 U.S. 13 (1964), overrule *United States* v. *General Electric Co.,* 272 U.S. 476 (1926)? This question requires an answer.

Consignment selling is and for many years has been a commonly used method of distribution in many industries.[6] Many consignment agreements now in effect

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[6] As noted by the dissenting Justices in *Simpson,* consignment arrangements are of widespread use throughout the nation's economy (377 U.S. at 30, 31). "Approximately one-sixth of the total volume of the nation's wholesale trade is carried on by independent brokers or agents who never acquire title to the goods they sell, and three and one-half per cent of such trade is accounted for by commission merchants or consignees." Handler, *Recent Antitrust*

were entered into in reliance on *General Electric, supra.* The legality of this method of distribution is of great importance to a substantial segment of the nation's private business. This case, therefore, presents a question of importance far transcending the particular facts and parties involved, and this petition, in a most realistic sense, seeks the determination of issues which will clarify the law for a substantial sector of the business community.

From the time of this Court's 1926 *General Electric* decision until 1964, there was no question as to the legality of consignment selling. By reason, however, of this Court's holding in *Simpson* in April 1964, substantial confusion now prevails. This confusion, primarily relating to the meaning of the *Simpson* holding, is being compounded and perpetuated by diverse court interpretations and by a myriad of interpretations by commentators.

In its opinion below, the court of appeals interpreted *Simpson* as declaring that any employment by a major gasoline company of consignment agreements with retail dealers is *per se* unlawful, regardless of the purpose of the program, and viewed *Simpson* as categorically limiting the protection granted such agreements by General Electric "to situations where . . . the consignor held patent rights" (App. A, p. 1a).

Faced with substantially parallel facts, the Seventh Circuit, in *Sun Oil Co.* v. *Federal Trade Commission,* No. 14503, 7th Cir., August 19, 1965 (printed as Ap-

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Developments, 63 Mich. L. Rev. 59, 61-62 (1964), citing Beckman, Engle & Buzzell, *Wholesaling* (3d ed. 1959); Phillips & Duncan, *Marketing-Principles and Methods,* (4th ed. 1960); Klaus, *Sale, Agency and Price Maintenance,* 28 Col. L. Rev. 312 (1928).

pendix B hereto, *infra,* pp. 19a-42a), interpreted *Simpson* differently. There, the court declined to interpret the holding as declaring consignment selling of nonpatented products *per se* illegal, and thought it the "best course" to "view *Simpson* limited by its own particular factual context, and to proceed case-by-case where consignment systems resulting in vertical price control are involved" (App. B, p. 38a). The special facts which the Seventh Circuit believed were significant in *Simpson* were those relating to the use of coercive tactics by Union Oil in obtaining acceptance of the consignment agreement by all of its retail gasoline dealers.

Adding to the perplexing confusion confronting business and the bar is the decision of the District Court for the Southern District of New York in *Lyons* v. *Westinghouse Electric Corp.,* 235 F. Supp. 526 (S.D.N.Y. 1964), where the court apparently believed that the controlling fact in finding Union Oil's consignment program unlawful was that it covered a "vast gasoline distribution system" (*Id.* at 535). If consignment selling is unlawful in this type of system, reasoned the court, "the same would seem to be true when the business is a vast system of distributing electric lamps" (*Id.* at 535-36).

In *CBS Business Equipment Corp.* v. *Underwood Corp.,* 240 F. Supp. 413 (S.D.N.Y. 1964), Judge Tenney, as did Judge McLean in *Lyons,* believed that in *Simpson* "the Supreme Court has given validity to the argument, rejected in GE, that 'the system of distribution is so complicated and involves such a very large number of agents, distributed throughout the entire country, that the very size and comprehensiveness of the scheme brings it within the Anti-Trust

Law' " (*Id.* at 424). He refused however to interpret *Simpson* as declaring consignment agreements *per se* unlawful, and, accordingly, denied a motion for summary judgment and ordered trial to determine, *inter alia,* whether the type of coercion found in *Simpson* was practiced by Underwood (*Id.* at 425-26).[7]

A realistic analysis of the pertinent judicial pronouncements on the issue of the legality of consignment selling as created by *Simpson* demonstrates, petitioner submits, that uniformity of interpretation and result will not be forthcoming until this Court instructs the business community and the bar as to the exact meaning of *Simpson,* and whether anything remains of the principles laid down in the 1926 *General Electric* case.

The record in the instant case will facilitate an informed and thorough analysis of the extent to which *General Electric* retains vitality. The record discloses in detail the underlying business and legal reasons prompting petitioner's utilization of consignment con-

[7] As is inevitable when an issue as sensitive and important as the legality of the consignment method of distribution is in question, numerous law review articles and comments have been written on the subject, again without apparent accord on the meaning of *Simpson.* See 6 B.C. Ind. & Com. L. Rev. 318 (1965); 14 De Paul L. Rev. 165 (1964); 17 Stan. L. Rev. 519 (1965); 16 Syr. L. Rev. 116 (1964); 43 Tex. L. Rev. 569 (1965); 2 Tulsa L. J. 55 (1965); 37 U. Colo. L. Rev. 293 (1965); 18 Vand. L. Rev. 222 (1964); 78 Harv. L. Rev. 143, 279 (1964); 63 Mich. L. Rev. 59 (1964). A review of these materials readily discloses the prevailing confusion. These differing interpretations, however, represent only the surface confusion. The practical and most perplexing confusion is to be found in the minds of businessmen and their legal advisors. Given the instruction now available, it is virtually impossible to chart a guide or the future or to advise a particular business that it may or may not continue or initiate a consignment method of distribution.

tracts, the competitive conditions under which such contracts were utilized, the results flowing therefrom and the attitude of and effect upon dealers. Thus, in accord with the suggestion of Mr. Justice Stewart in his dissenting opinion in *Simpson,* and of Justices Brennan and Goldberg in their separate memorandum, the instant case—compared to *Simpson* which was dismissed by the district court on a motion for summary judgment—offers an opportunity to consider legal issues of great "impact and magnitude"[8] on the basis of a full record, including a record on the question of whether the consignment involved is a "coercive type of 'consignment' agreement."[9] This case will also afford the Antitrust Division of the Department of Justice an opportunity to express its views.

II. THE COURT BELOW INCORRECTLY INTERPRETED SIMPSON IN APPLYING IT TO THE FACTS IN THE INSTANT CASE AND IN SO DOING REACHED A CONCLUSION IN CONFLICT WITH THAT OF THE SEVENTH CIRCUIT

A. On the Facts of This Case, the Court of Appeals Erred in Holding That Simpson v. Union Oil Co. Is Controlling

The basic question presented by this case is whether petitioner may assume the burdens of marketing directly to the consumer during price wars by means of consignment selling in order to preserve its dealers against severe financial loss and possible extinction and yet avoid liability under the price discrimination provisions of the Robinson-Patman Act, 15 U.S.C. § 13(a).

The court below viewed *Simpson* as placing a blanket prohibition on the "employment by a major gasoline company of consignment agreements with gas station

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[8] 377 U.S. at 29.

[9] *Id.* at 32.

owners" and limiting "the protection of such agreements . . . to situations where the protected consignment agreements pertained to products on which the consignor held patent rights" (App. A, p. 1a). The court of appeals dismissed petitioner's argument that the facts of the instant case regarding the purpose and function of its program and the absence of coercive acts distinguishes it from *Simpson* as "seeking to restore vitality to *United States* v. *General Electric Co., supra*" (App. A, p. 9a). "As such," said the court of appeals, "this argument must plainly be addressed not to this court, but to the United States Supreme Court in an argument which seeks the overruling of *Simpson* v. *Union Oil Co., supra*" (*Ibid.*).

Petitioner submits that the court of appeals erred in finding no distinction between *Simpson* and this case; there are two major distinctions. The first lies in the undisputed fact that petitioner initiated and utilized its consignment program for the express purpose of avoiding price discrimination liability under the Robinson-Patman Act in assisting its dealers in price war conditions. Because of the increasingly complex questions involved in granting dealer assistance in price war situations posed by that Act,[10] petitioner sought a legal method by which it could grant effective assistance to its dealers. Relying upon the judicial sanction of bona fide consignment contracts found in

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[10] Under the Robinson-Patman Act, the Federal Trade Commission has challenged virtually every system employed by oil companies to provide assistance to dealers. See *The Texas Company*, FTC Docket 6898; *Federal Trade Commission* v. *Sun Oil Co.*, 371 U.S. 505 (1963); *Pure Oil Co.*, FTC Docket 6640; *American Oil Co.* v. *Federal Trade Commission*, 325 F. 2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964); *Humble Oil and Refining Co.*, FTC Docket 8544; *Shell Oil Co.*, FTC Docket 8537.

General Electric, and the fact that the use of consignment contracts with gasoline dealers had been expressly suggested by this Court as a legitimate method of doing business in *Standard Oil Co.* v. *United States,* 337 U.S. 293, 310 (1949), petitioner initiated its consignment program.

In application, petitioner's program complied strictly with the purpose of its initiation. The findings of the hearing examiner, the commission, and the court of appeals leave no doubt in this regard. The hearing examiner found: "So far as the record is concerned, it is clear that in all instances the respondent [petitioner] offered to help the dealer meet an impossible competitive situation" (R. 55a). The commission's finding, adopted by the court of appeals, was that petitioner's policy was to offer its dealers assistance in the form of a consignment contract "[w]hen price war conditions prevail in a given competitive trade area so that the spread between the dealer [tank wagon] price of Atlantic gasoline and the prevailing service station price at comparable service stations is less than 4¢ per gallon . . ." (App. A, p. 4a; R. 69a). Petitioner constantly surveyed markets and only when it ascertained that general market prices were so deteriorated because of price war conditions that its dealers could not survive without aid did it offer to enter into consignment contracts (R. 40a-41a).

Thus, while this Court in *Simpson* could find no reason for the adoption of the consignment method of distribution by Union Oil, aside from resale price maintenance, it is clear that the function and purpose of petitioner's consignment program was not to maintain or control retail prices but to provide what petitioner believed was a legal method of assisting its

dealers in remaining viable competitors while avoiding liability under the Robinson-Patman Act.

The court of appeals rejected petitioner's argument that the fact petitioner restricted the employment of its consignment agreement to price war situations distinguishes the case from *Simpson,* believing instead that the "fact that it applied its consignment agreement only to price wars simply underlines the fact that this was indeed, as found by the Commission, a price fixing mechanism" (App. A, p. 14a). The court of appeals erred in so holding. Not only does the limitation to price war situations in petitioner's program distinguish this case from *Simpson* but it conclusively demonstrates that petitioner's purpose was to assist dealers by making it possible for them to sell at reduced prices to meet competition rather than to maintain resale prices. This is the very antithesis of the *Simpson* case. Indeed, the litigation there arose because Union Oil refused to permit Simpson to reduce his prices to meet competition. Simpson insisted, reduced his prices, and Union Oil refused to renew his lease because he did so.

The second major distinction between the instant case and *Simpson* lies in the issue of "coercion." The court below found it "clear that Union Oil applied its system coercively to Simpson because they refused to renew a lease to him solely because he sold gasoline below their fixed price" (App. A, p. 12a). In obvious contradiction the court then adopted the commission's finding that petitioner's program "as planned and implemented, did not entail forcing dealers, including lessee-dealers, operating on company-owned premises, to execute the consignment agreements . . ." and that "there does not appear to be any evidence in this record

that the respondent [petitioner] used its position of economic power over its lessee dealers to force them into entering the contract" (App. A, pp. 13a, 14a). However, the court of appeals believed that the essential coercive element existed by virtue of the fact that "business conditions" (price wars), which petitioner admittedly did not create and had no power to prevent, made it advantageous for dealers to enter into the consignment arrangements. The court below thus adopted the following reasoning of the commission:

> Any dealer faced with a price-war situation was offered the consignment program or nothing . . . . To the extent that the lessee-dealers had no alternative but economic death to entering a consignment agreement with respondent, it must be found that they were pressured or coerced to enter such contracts and the hearing examiner's finding to the contrary is in error (App. A, pp. 13a-14a).

Since the granting of needed assistance to petitioner's dealers by any method other than consignment[11] would necessarily have involved reducing the dealer buying price, any alternative would have completely destroyed one of the purposes of petitioner's consignment programs, *i.e.*, avoidance of price discrimination liability. Thus, the holding of the court of appeals and the commission is apparently that petitioner was required to risk liability under the Robinson-Patman Act and offer reduced buying prices as an alternative to the consignment agreement, although there was no question at the time of the legality of consignment selling. Consequently, the type of "coercion" found to exist by the commission and the court of appeals is

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[11] Petitioner was not legally required, of course, to offer its dealers assistance in any form.

unavoidably present whenever a company adopts the consignment method of distribution for the purpose of avoiding price discrimination liability in assisting its dealers to remain competitive. What the court of appeals below actually held, therefore, is that consignment selling under such circumstances is *per se* illegal. This holding, petitioner submits, is erroneous and is not in accord with *Simpson*.

B. The Holding of the Court Below on the Key Issue of Coercion Is in Conflict With the Holding of the Seventh Circuit in Sun Oil Co. v. Federal Trade Commission

In *Sun Oil Co.* v. *Federal Trade Commission,* No. 14503, 7th Cir., August 19, 1965 (App. B, *infra,* pp. 19a-42a), the court of appeals had before it a petition by Sun Oil Company to review a Federal Trade Commission order to cease and desist from horizontal and vertical price fixing by means of consignment arrangements with retail gasoline dealers. The facts there found by the commission, as distinguished from those here, were that Sun had negotiated the agreement with the dealers in group meetings rather than individually. On these facts, the Seventh Circuit held there was adequate basis for finding that Sun had acted as a conduit for dealers' *horizontal* price fixing agreements. Agreeing with the commission, the Seventh Circuit thus distinguished *General Electric* "on the ground that this price fixing was horizontal as well as vertical," and found *United States* v. *Masonite Corp.,* 316 U.S. 265 (1942), controlling (App. B, p. 34a).

While there is in this case no issue regarding horizontal price fixing, the Seventh Circuit in *Sun* was faced with facts substantially parallel to those here regarding the alleged vertical price fixing. Sun, the court of appeals found,

> . . . gave its dealers the alternative of accepting commission consignment or continuing to purchase gasoline at the established tank-wagon price (the posted price to dealers and commercial users) and posting whatever retail price they saw fit as independent dealers . . . . In other words, a Sun dealer not participating in the commission consignment arrangement not only would have to compete with the lower prices of other brands of gasoline, but also would be faced with the lower prices of Sun dealers on consignment. As Southard testified before the hearing examiner, a dealer who refused consignment might be required to sell at a loss to meet the prices of Sun's consignees (App. B, pp. 27a-28a).

No distinction exists between these facts and the "business conditions" which the court of appeals in the instant case found to constitute "coercion." However, the two courts of appeals reached directly opposite conclusions. The court below held that "coercion" within the meaning of *Simpson* existed on the basis of the facts in the instant case, although it specifically found that petitioner's "program as planned and implemented, did not entail forcing dealers . . . to execute the consignment agreement . . ." and that petitioner did not use "its position of economic power over its lessee dealers to force them into entering the contract" (App. A, pp. 13a, 14a). In contrast, the court of appeals in *Sun* found that it could not "hold the facts presented by [that] record controlled by *Simpson*" (App. B, p. 39a),[12] the holding apparently being based

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[12] Although the facts concerning the so-called "Hobson's Choice" theory of coercion in the *Sun* case are indistinguishable from the facts in the instant case, the court of appeals in *Sun* correctly believed that the type of coercion "found in [the instant case], wherein the gasoline dealer was offered the 'Hobson's Choice' of 'economic disaster or the consignment agreement'" (App. B, pp. 38a-39a), was not, as a matter of law, sufficient to render *Simpson* controlling.

upon the fact that the record in the *Sun* case, as in the instant case, gave no indication that Sun actually used coercive tactics in obtaining acceptance of its consignment contracts. In short, in obvious conflict with the court of appeals' holding below, the Seventh Circuit in *Sun* held that the type of coercion, which this Court in *Simpson* found to render unlawful a consignment program, must be more than "business conditions" which make it advantageous for dealers to enter into the consignment contract.

III. PETITIONER HAVING UTILIZED CONSIGNMENT SELLING IN RELIANCE UPON GENERAL ELECTRIC, THE COURT OF APPEALS ERRED IN REFUSING TO CONSIDER WHETHER THE EQUITIES WARRANT ONLY PROSPECTIVE APPLICATION OF ITS INTERPRETATION OF SIMPSON

In *Simpson,* this Court cautioned that there may be "equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announce today" (377 U.S. at 24-25). Petitioner, as both the commission and the court of appeals found, relied in good faith upon the legality of its consignment program under the long standing and then firmly established principle of *United States* v. *General Electric Co.,* 272 U.S. 476 (1926).

Before the court below, petitioner therefore argued that in equity and fairness a finding of violation should not be based upon a retroactive application of *Simpson.* The court of appeals declined to meet this issue on the basis that "the relief contemplated by this order consists of cease and desist orders which can be applied only prospectively after determination of their validity . . ." (App. A, p. 15a).

It is true, of course, that commission orders have only prospective application. This observation, how-

ever, is an evasion of the real issue—one of equity and fairness. Every court since *Simpson* which has been faced with the issue of retroactive application of that ruling has declined on equitable grounds to find liability. *Lyons* v. *Westinghouse Electric Corp.*, 235 F. Supp. 526 (S.D.N.Y. 1964); *CBS Business Equipment Corp.* v. *Underwood Corp.*, 240 F. Supp. 413, 426 (S.D.N.Y. 1964). See also *Guidry* v. *Continental Oil Co.*, No. 21543, 5th Cir., July 2, 1965, 1965 Trade Cas. ¶ 71,495.

The simple principle of fairness in declining to apply retroactively an overruling decision has been applied also in administrative proceedings involving cease and desist orders with only prospective application. See, *e.g.*, *NLRB* v. *International Brotherhood of Teamsters*, 225 F. 2d 343, 348 (8th Cir. 1965) ("we do not believe that the spirit of the Act, either administrative or general, entitles the Board, on engaging in such an about-face from its previous position and ruling, no matter in what manner or circumstances this is done, to brand a party as being guilty of an unfair labor practice" so long as the "Board's express [prior] holding . . . has remained unrenounced"). See also *Lesavoy Foundation* v. *Commissioner of Internal Revenue*, 238 F. 2d 589 (3rd Cir. 1956).

It is undisputed that petitioner utilized consignment selling in reliance upon *General Electric*. The hearing examiner held that petitioner's policy was "within the principles laid down" in *General Electric* (R. 54a). The commission found that "[d]oubtless the respondent felt that it had devised a consignment program valid in that it met all of the criteria of consignment as prescribed in the law of agency . . ." (R. 79a).

And the court of appeals adopted the commission's finding regarding petitioner's reliance (App. A, p. 9a).

It is no answer to assert that *Simpson* involved potential monetary damages in a treble damage action whereas petitioner here will be subject to injunction in the form of a cease and desist order. It cannot be gainsaid that orders of the Federal Trade Commission, which run in perpetuity and for violation of which severe penalties may be imposed, are even more serious and of greater consequence than exposure to "one shot" money judgments resulting from treble damage cases. To contend otherwise is to ignore business realities.

Notwithstanding this, the court below refused to even consider the question of retroactive application of its interpretation of *Simpson.*

IV. THE COURT OF APPEALS ERRED IN HOLDING THAT AN OPINION AND ORDER CONCURRED IN BY ONLY TWO OF THE FIVE COMMISSION MEMBERS IS VALID AND ENFORCEABLE

The final order and opinion of the commission below was entered upon the affirmative vote of only two members of the commission (R. 83a). The fundamental question of whether less than a majority of the commission members may act on behalf of the commission in entering orders to cease and desist is thus presented. This issue is one of first impression before this Court and, insofar as can be ascertained, has never been decided by any court except the court below.

Orders of the commission being of substantial import to individual businesses and having vast potential

impact upon the nation's private economy, the issue requires resolution by this Court.[13]

The court of appeals below, in rejecting petitioner's argument on this point, stated that "[t]he rules of the Federal Trade Commission since its inception have provided for decision by the majority of panels of three members," referring to § 1.7 of the Commission's Rules of Practice and Procedure (16 C.F.R. § 1.7), and that "[w]e believe this rule is within the Commission's power to make and is wholly valid," citing *Drath* v. *Federal Trade Commission,* 239 F. 2d 452 (D.C. Cir. 1956), *cert. denied,* 353 U.S. 917 (1957) (App. A, p. 14a). These authorities do not support the court's holding.

The *Drath* case was not concerned with the question here posed. That case involved only the question of whether the rule allowing the commission to transact business through three of its five members could properly be applied to its adjudicative functions. Three commissioners (the entire quorum and hence a majority of the commission) having agreed to issue the order, the further question of whether a simple majority of the three member quorum could validly enter an order was not raised. This being the precise issue presented in the instant case, *Drath* is not in point.

Where Congress has intended that less than the entire membership of an administrative body may participate in a decision, it has provided for such a contingency in the agency's organic act. Thus, the

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[13] The issue is currently pending before the Ninth Circuit in *Flotill Products Inc.* v. *Federal Trade Commission, appeal filed* No. 19,521, 9th Cir., September 10, 1964. It was also raised before the Fifth Circuit in *The Borden Co.* v. *Federal Trade Commission,* 339 F. 2d 953 (7th Cir. 1964), where the court, reversing the commission on other grounds, found it unnecessary to reach the question.

Federal Power Act creating the Federal Power Commission provides, similar to the Federal Trade Commission Act, that:

> No vacancy in the commission shall impair the right of the remaining commissioners to exercise all the powers of the commission (16 U.S.C. § 792).

Significantly, however, the next sentence declares that "[t]hree members of the commission shall constitute a quorum for the transaction of business. . . ."

Likewise, Congress has specifically provided that the National Labor Relations Board (29 U.S.C. § 153), the Federal Communications Commission (47 U.S.C. § 154(h)), the Securities and Exchange Commission (15 U.S.C. § 78(d)(1)), and the Interstate Commerce Commission (49 U.S.C. § 17) can each act and transact business without the full membership. Such provision is not contained in the Federal Trade Commission Act and the commission thus had no authority to adopt the Rule (16 C.F.R. § 1.7) relied upon by the court below.

It is a cardinal principle of statutory construction that, where the legislature has affirmatively designated a particular right or power in one instance and omitted it in another, the intent to create such a right or power in the second instance may not be implied. See Sutherland, *Statutory Construction,* Vol. 2, Section 4915, and cases cited therein. Had Congress intended that a minority of the Federal Trade Commission should have the authority to act for the entire body, it would have specifically provided for a quorum whose decision would be equivalent to an act of the commission. Petitioner therefore submits that the order entered in this case was not entered by "the commission" and is, accordingly, not valid or enforceable.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD F. HOWREY
HAROLD F. BAKER
TERRENCE C. SHEEHY
1707 H Street, Northwest
Washington, D. C. 20006

Attorneys for Petitioner

Of Counsel:

HOWREY, SIMON, BAKER & MURCHISON
1707 H Street, Northwest
Washington, D. C. 20006

ROY W. JOHNS
EDWARD J. KREMER, JR.
260 South Broad Street
Philadelphia, Pennsylvania 19101

September 1965

APPENDIX A

Opinion, Judgment and Orders Below

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15745

THE ATLANTIC REFINING COMPANY, a Corporation,
Petitioner,

v.

FEDERAL TRADE COMMISSION, *Respondent.*

Petition to Review an Order to Cease and Desist

Decided April 12, 1965

Before: PHILLIPS and EDWARDS, Circuit Judges; MCALLISTER, Senior Circuit Judge.

EDWARDS, Circuit Judge. Our problems with this petition would be considerable if the United States Supreme Court had not recently grappled with and decided the major questions which confront us. In *Simpson* v. *Union Oil Co. of California,* 377 U.S. 13 (1964), the Supreme Court held that employment by a major gasoline company of consignment agreements with gas station owners to fix retail prices of gasoline represented violations of the Sherman Anti-Trust Act, 26 Stat. 209, 15 U.S.C. §§ 1 and 2. The opinion by Mr. Justice Douglas, joined by four other members of the Court, limited the protection of such agreements (which Union Oil Co. and our present appellant had found in *United States* v. *General Electric Co.,* 272 U.S. 476 (1926)) to situations where the protected consignment agreements pertained to products on which the consignor held patent rights. Petitioner here holds no such patent rights.

In the instant case a three-count complaint was filed against petitioner Atlantic Refining Company by the Secretary of the Federal Trade Commission. The first count

alleged Atlantic violated the Federal Trade Commission Act, 15 U.S.C. § 45, by coercing its lessee dealers into signing a "temporary consignment contract" to sell at a single and noncompetitive price set by Atlantic. Counts 2 and 3 were conspiracy counts. Count 2 charged a conspiracy to fix prices applicable to the temporary consignment contract with lessee dealers and Count 3 charged a conspiracy between Atlantic and its independent wholesale distributors to maintain Atlantic's uniform resale price by the granting to the distributors of certain allowances or rebates which they were to pass on to their own dealer customers who had agreed to adhere to Atlantic's resale price.

The Hearing Examiner having found that the complaint was sustained only as to Count 3, and having recommended a cease and desist order as to it, appeals were taken by both parties to the full Commission. There the appeals were heard by three Commissioners. A majority of two reversed the Hearing Examiner as to Counts 1 and 2 and entered cease and desist orders as sought by the complaints in relation to all three counts.

The relevant facts as found by the Commission are as follows:

> "The respondent is a Pennsylvania corporation, primarily engaged in the production, sale and distribution of gasoline and other petroleum products throughout a 17-state marketing area. Its 'regular' gasoline is sold under the brand name 'Atlantic,' and its high test fuel under the name 'Imperial.' Respondent owns and operates refineries at Philadelphia, Pennsylvania, and Atreco, Texas. In 1956 its gross domestic sales of petroleum and chemical products, including sales of its consolidated subsidiaries, amounted to approximately $379,000,000.
>
> "The respondent markets its gasoline in two ways. It sells directly to the operators of retail gasoline service stations who either own and operate their own

stations, or lease the premises from the respondent or others. The second marketing system entails sales to wholesale distributors who in turn resell to retail service station dealers. In the geographic area with which the facts of this case are concerned, respondent used both systems.

"The controversy in this case centers chiefly in an area referred to by the examiner as the 'Delmarva Peninsula.' As a glance at the map will show, the Delmarva Peninsula is that body of land which separates the Chesapeake Bay from the Delaware Bay and Atlantic Ocean. It acquires its names from the fact that it lies within the boundaries of the States of Delaware, Maryland and Virginia. In 1957 a gasoline price war erupted on the Peninsula. The allegedly unlawful acts and practices of this respondent were performed in connection with this price war.

"The practices engaged in by the respondent in the Delmarva price war were not spur of the moment expedients but constituted the implementation of predetermined company policy. The respondent states 'under price war conditions it is the policy and practice of respondent to assist its retail dealers to remain in business. It is likewise the policy and practice of respondent to assist its distributors in order that they may, in turn, sell to their retail dealers at a price which allows such retail dealers to be generally competitive and thus not suffer economically and competitively or be forced out of business.'

. . .

"Since, as aforesaid, the respondent utilized two methods of distribution, their 'assistance' to dealers in a price-war area, was accomplished in different fashions. As alleged in Counts I and II of the complaint, on direct sales to retail service stations, the respondent utilized temporary consignment contracts. This pro-

cedure was devised and implemented by the company in early 1956. It provided: 'When price war conditions prevail in a given competitive trade area so that the spread between the dealer [tank wagon] price of Atlantic gasoline and the prevailing service station price at comparable service stations is less than 4¢ per gallon, all Atlantic dealers . . .' will be offered the opportunity to 'execute a contract sales agreement and become our contractors for the retail sale of Atlantic-owned gasoline.'

. . .

"There is no dispute concerning the basic details of the consignment program. The hearing examiner succinctly explains it . . . in the following terms:

'1. The Company will place gasoline on consignment with the dealer subject to prior approval by the Credit Department. At the time of each replenishment delivery, the volume of gasoline on consignment is to be brought to its original level. The dealer will settle in cash at the time of replenishment for the number of gallons equal to the replenishment delivery on the basis of Atlantic's posted service station price at the time at which the gasoline was sold, less a commission for Atlantic gasoline, representing 23% of the service station price for the product, excluding all taxes.

'2. Atlantic will specify the service station price of gasoline posted by the dealer during the period of the consignment plan agreement, the dealer to be trustee of proceeds of sale.

'3. Title to gasoline constituting any replenishment delivery shall not pass to the dealer.'

"The record reveals that respondent entered consignment agreements with 37 of its dealers in its area number 4 during 1957 and 1958. Two of these dealers

were located in Maryland and the remainder in Delaware. Although the price war was over in Sussex County, Delaware, by September 13, 1957, dealers in that County remained under the consignment program until as late as September 1958. The price war continued for a longer time in Newcastle and Kent Counties in Delaware, and thereto the consignment agreements remained in effect during 1958.

"There can be no doubt but that respondent, through the operation of this consignment program as above described was able to, and did, in fact, fix uniform retail prices for gasoline sold to consumers by its lessee-dealer service stations in its areas 1, 2, 3 and 4, located on the Delmarva Peninsula. But in order to maintain the prices established by the respondent through the consignment program, it was necessary to secure the compliance of these dealers who did not buy directly from respondents but through an intervening wholesale distributor. Respondent's announced policy on pricing is:

> 'There will be only one retail price at all times in any given pricing area. This will be called Atlantic's posted retail price.
>
> 'A reasonable relationship will always be maintained between posted retail price, posted dealer tank wagon price, and posted consumer tank wagon price.'

"Since the dealers buying from a wholesale distributor were his customers and not those of the respondent, control over their prices could only be maintained and secured by enlisting the cooperation of the wholesale distributor who served them. The hearing examiner found that the respondent did secure the cooperation of its sometimes unwilling distributors, and thereby conspired with them to fix prices as charged in

Count III of the complaint and in violation of Section 5 of the Federal Trade Commission Act.

"The system pursued was to grant the wholesale distributor a lower price to enable him to in turn sell at a lower price to such dealers as would maintain the consumer price set and fixed by respondent for its direct buying dealers operating under the consignment plan. The simple mechanics of the pricing procedure utilized are explained in an Atlantic bulletin to its district managers, as follows:

> 'A fictitious dealer tank wagon price will be computed by using the retail price, excluding tax, that we have established on contract sales operation less 23%. For example, if we are on contract sales operation at 26.9, the fictitious dealer tank wagon price for use by the distributor would be 13.8. This is the price which we would expect distributors to charge their dealers within the area where we are on contract sales operations. . . .'

"If a wholesaler sold to a dealer at the 'fictitious dealer tank wagon price' under certain conditions prescribed and enforced by the respondent, he would, upon application to respondent, be rebated two-thirds of the difference between the price he charged the dealer and what would be a normal dealer price. He was required to absorb the remaining one-third. The conditions prescribed by the respondent for a wholesaler to meet in order to secure his rebate, were:

"(1) They must sell the fictitious or reduced dealer tank wagon prices to those retail dealers located in a depressed or price-war area.

"(2) They must furnish respondent evidence of such sale in an application for the rebate on forms previously supplied to them by the respondent. On these forms they must indicate the dates, gal-

lonage sold and list the dealers to whom they gave the rebate.

"(3) Upon receipt of the forms, the respondent calculated the amount of the rebate and remitted to the distributor, but only for the number of gallons sold to those dealers who had resold at respondent's fixed retail price established for its consignment lessee-dealer stations. The distributor had to sustain the full loss for sales to those dealers for whom the respondent disallowed the rebate.

"The way in which respondent's pricing plan worked with distributors is indicated by the experience of the Atlantic Oil Company of Georgetown, Delaware, one of respondent's distributors in Sussex County, Delaware. Charles B. Marsh, the witness representing this distributor, testified that the company had around 18 dealer customers. During the price wars in Sussex County in 1957, respondent assisted the Atlantic Oil Company in aiding the latter's dealers by granting refunds (in effect a lower tank wagon price) on sales. Atlantic Oil Company sold its dealers at a reduced price and in turn applied to the respondent for refunds based on the dealer assistance.

"These compensatory refunds were granted by the respondent to Atlantic Oil Company on the understanding, the evidence shows, that the distributor would lower its prices to dealers and that the dealers in turn would post pump prices suggested by the respondent.

"Mr. Marsh testified that J. White, an employee of respondent, checked on the pump prices of Marsh's dealers and reported this information to Marsh. This same employee also accompanied Marsh on inspection tours of Marsh's dealers. At such times White asked the dealers to raise their prices to the figure recom-

mended by respondent. Most of Marsh's dealers posted uniform pump prices during the 1957 price wars but there were four notable hold-outs. These were: Bunting, Frankfort, Delaware; Burton, Georgetown, Delaware; R. J. Campbell, Frankfort, Delaware; and McGee & West, Somerville, Delaware. When these dealers refused to sell at the pump prices specified by respondent, Atlantic Oil Company was denied compensatory refunds on transactions with them. This is revealed by the testimony as well as documentary evidence.

"Various employees of respondent, such as Mr. White and Mr. Hughes, contacted Witness Marsh about the four nonconforming dealers and insisted that they raise their prices. Mr. White recommended as possible action against these dealers, if they refused to conform to the recommended prices, that Marsh take out their pumps and insignia. Marsh was also threatened with the loss of his franchise if he did not bring these dealers into line. Mr. Zinn, District Sales Manager of respondent, requested from Marsh and received the contracts that this distributor had with such dealers. Mr. Marsh testified that the explained purpose of obtaining the contracts was to see if they could be broken. However, no such action was taken. The four recalcitrant dealers all thereafter raised their prices, although some did this only as a temporary measure and shortly returned to their prior prices."

It does not appear that petitioner disputes the accuracy of this factual background. But it certainly does dispute the principal conclusions drawn therefrom.

The Commission's chief conclusion was stated thus:

"It is apparent from the facts that respondent very clearly desired to stifle price competition among

> Atlantic dealers and it sought the complete control of Atlantic retail prices in the price war area. Respondent utilized the consignment system of marketing as a device to control prices admittedly to avoid the impact of the Clayton and Sherman Acts. Doubtless the respondent felt that it had devised a consignment program valid in that it met all of the criteria of consignment as prescribed in the law of agency and it may well be that for purposes other than anti-trust law enforcement this consignment program could be upheld. But, as here, employed, to effect and participate as an integral unit of a horizontal and vertical price fixing scheme, the respondent's consignment program must be held as a violation of the Federal Trade Commission Act."

As we have noted, the Commission entered cease and desist orders as to the practices alleged in all three counts of the complaint.

Before this court the petitioner attacked the conclusion set forth above, claiming that its consignment plan was a good faith and wholly legal marketing method, and not, as found by the Commission, an integral part of an overall illegal plan to fix and maintain prices.

Basically petitioner's argument on this score we read as seeking to restore vitality to *United States* v. *General Electric Co., supra.* As such this argument must plainly be addressed not to this court, but to the United States Supreme Court in an argument which seeks the overruling of *Simpson* v. *Union Oil Co., supra.*

This effort may prove to be rather a formidable undertaking, since, as is true so often of that Court, a trend toward the *Union Oil* holding had been plainly foreshadowed (as the Federal Trade Commission's opinion in the instant case demonstrates) by such cases as *United States* v. *Socony Vacuum Oil Co.,* 310 U.S. 150 (1940); *United*

States v. *Masonite Corp.*, 316 U.S. 265 (1942); *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944), and *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960).

And the opinion of the Court in *Union Oil* seems definitive as to the principal argument at issue pertaining to whether consignment agreements may be used by a producer to fix and maintain retail prices:

> "Consignments perform an important function in trade and commerce, and their integrity has been recognized by many courts, including this one. See *Ludvigh* v. *American Woolen Co.*, 231 U.S. 522. Yet consignments, though useful in allocating risks between the parties and determining their rights *inter se*, do not necessarily control the rights of others, whether they be creditors or sovereigns. Thus the device has been extensively regulated by the States. 22 Am. Jur., Factors, § 8; *Hartford Indemnity Co.* v. *Illinois*, 298 U.S. 155. Congress, too, has entered parts of the field, establishing by the Act of June 10, 1930, 46 Stat. 531, as amended, 7 U.S.C. § 499a *et seq.*, a pervasive system of control over commission merchants dealing in perishable agricultural commodities.
>
> "One who sends a rug or a painting or other work of art to a merchant or a gallery for sale at a minimum price can, of course, hold the consignee to the bargain. A retail merchant may, indeed, have inventory on consignment, the terms of which bind the parties *inter se*. Yet the consignor does not always prevail over creditors in case of bankruptcy, where a recording statute or a 'traders act' or a 'sign statute' is in effect. 4 Collier, Bankruptcy (14th ed.), pp. 1090-1097, 1484-1486. The interests of the Government also frequently override agreements that private parties make. Here we have an antitrust policy expressed in Acts of Congress. Accordingly, a consignment, no

matter how lawful it might be as a matter of private contract law, must give way before the federal antitrust policy. Thus a consignment is not allowed to be used as a cloak to avoid § 3 of the Clayton Act. See *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 353-356; cf. *Straus* v. *Victor Talking Mach. Co.*, 243 U.S. 490, 500-501. Nor does § 1 of the Sherman Act tolerate agreements for retail price maintenance. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-222; *United States* v. *Parke, Davis & Co., supra.*

. . .

"Dealers, like Simpson, are independent businessmen; and they have all or most of the indicia of entrepreneurs, except for price fixing. The risk of loss of the gasoline is on them, apart from acts of God. Their return is affected by the rise and fall in the market price, their commissions declining as retail prices drop. Practically the only power they have to be wholly independent businessmen, whose service depends on their own initiative and enterprise, is taken from them by the proviso that they must sell their gasoline at prices fixed by Union Oil. By reason of the lease and 'consignment' agreement dealers are coercively laced into an arrangement under which their supplier is able to impose noncompetitive prices on thousands of persons whose prices otherwise might be competitive. The evil of this resale price maintenance program, like that of the requirements contracts held illegal by *Standard Oil Co.* v. *United States, supra,* is its inexorable potentiality for and even certainty in destroying competition in retail sales of gasoline by these nominal 'consignees' who are in reality small struggling competitors seeking retail gas customers." *Simpson* v. *Union Oil Co., supra,* at 17-18, 20-21 (1964). (Footnotes omitted.)

This case deals with the same industry and a parallel employment of a consignment agreement by Union Oil. The case, however, had a different origin. It was a suit for treble damages under § 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15, for violation of §§ 1 and 2 of the Sherman Act, *supra.*

The courts have construed the Federal Trade Commission Act as being "in *pari materia*" with the Sherman and Clayton Acts. *Menzies* v. *Federal Trade Commission,* 242 F.2d 81 (C.A. 4, 1957), *cert. denied,* 353 U.S. 957 (1957). This construction allows for using cases decided under any of the antitrust laws in dealing with cases brought by the Commission. *Federal Trade Commission* v. *Beech-Nut Packing,* 257 U.S. 441, 453 (1922); *Federal Trade Commission* v. *Motion Picture Adv. Service Co.,* 344 U.S. 392, 394-395 (1953). The fact that *Simpson* v. *Union Oil Co., supra,* was a suit for treble damages under the Sherman and Clayton Acts does not weaken its application to the case at hand.

There are, however, two distinctions between the fact situation in *Union Oil* and this case involved. First, it is clear that Union Oil applied its system coercively to Simpson because they refused to renew a lease to him solely because he sold gasoline below their fixed price. In the instant case petitioner claims that there is no showing of "coercion." Second, in *Union Oil,* consignment agreements were the standard practice under which the company operated, while in the Atlantic situation the consignment agreements were to go into effect only during a price war.

As to both of these issues the petitioner in this review must overcome adverse findings by the Federal Trade Commission. The statute which authorizes our review, 15 U.S.C. § 45(c), provides: "The court . . . shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission." It also provides that the "findings of the Commission as to the facts,

if supported by evidence, shall be conclusive." And the Supreme Court has held that "The weight to be given to the facts and circumstances admitted, as well as the inferences, reasonably to be drawn from them, is for the commission." *Federal Trade Commission* v. *Pacific States Paper Trade Association,* 273 U.S. 52, 63 (1927).

As to the distinctions pertaining to coercion and to the fact that Atlantic only used its consignment policy temporarily during price wars, whereas Union Oil's consignment policy was permanent in operation, the Commission's opinion commented:

> "It is important to note that the company's program as planned and implemented, did not entail forcing dealers, including lessee-dealers, operating on company-owned premises, to execute the consignment agreements but under the circumstances, such overt control was unnecessary. Any dealer faced with a price-war situation was offered the consignment program or nothing. In other words, the company would not reduce its prices to him to enable him to independently set his own resale price and thereby meet competition as he saw fit. He was offered, in effect, 'Hobson's Choice' of continuing to buy at the normal dealer price, entering a consignment agreement, or terminating all existing contractual relations with the respondent. As several of the dealer-witnesses testified, it was a case of either signing the consignment contract or going out of business. Respondent argues that the only coercive force present in the situation was engendered by the price war market conditions, which the record shows it did not create. But this is no answer. One cannot justify offering a hot poker to a drowning man by averring that the water was to blame. To the extent that the lessee-dealers had no alternative but economic death to entering a consignment agreement with respondent, it must be found that they were pressured or coerced to enter such con-

> tracts and the hearing examiner's finding to the contrary is in error. However, there does not appear to be any evidence in this record that the respondent used its position of economic power over its lessee dealers to force them into entering the contract. Under the business conditions which existed, such pressure was unnecessary."

It appears plain to us that Atlantic's policy was the maintenance of one posted retail price at all of its retail outlets. And the fact that it applied its consignment agreement only to price wars simply underlines the fact that this was indeed, as found by the Commission, a price-fixing mechanism.

On the coercion issue it seems to us that this record affords "substantial evidence" to support the inferences found by the Commission. *Standard Distributors* v. *Federal Trade Commission,* 211 F.2d 7, 12 (C.A. 2, 1954), *rehearing denied,* 211 F.2d 16 (1954); *Federal Trade Commission* v. *Pacific States Paper Trade Association, supra.* When Atlantic establishes a policy of refusing to change its wholesale price to meet the competition confronting its distributors and offers them only the choice of economic disaster or the consignment agreement, it has, indeed, offered a "Hobson's Choice." We agree with the Commission that no valid distinction between the consignment practices condemned in *Union Oil* and those shown here may be found on this record.

As to other issues presented by petitioner, we can be more succinct. The rules of the Federal Trade Commission since its inception have provided for decision by the majority of panels of three members.[1] We believe this rule is within the Commission's power to make and is wholly valid. *Drath* v. *Federal Trade Commission,* 239 F.2d 452 (C.A. D.C., 1956), *cert. denied,* 353 U.S. 917 (1957).

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[1] "A majority of the members of the Commission constitutes a quorum for the transaction of business." 16 C.F.R. 1.7.

The record amply supports the conclusions of the Commission that Atlantic was engaged in interstate commerce and that its consignment policy was a company policy, nationally conceived and applied.

Since the relief contemplated by this order consists of cease and desist orders which can be applied only prospectively after determination of their validity, we see no need to grapple now with the questions as to whether *Simpson* v. *Union Oil Co., supra,* should be applied retroactively.

The order and opinion of the Federal Trade Commission is affirmed. An order for enforcement may be presented.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15745

THE ATLANTIC REFINING COMPANY, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

Order

Before: PHILLIPS and EDWARDS, Circuit Judges, and McALLISTER, Senior Circuit Judge.

On petition for review of an order of the Federal Trade Commission,

This cause came on to be heard on the transcript of the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the order of the Federal Trade Commission be and it is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.

CARL W. REUSS
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15745

THE ATLANTIC REFINING COMPANY, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

Final Decree Affirming and Enforcing Order to Cease and Desist

The Atlantic Refining Company, a corporation, petitioner herein, having filed in this Court on January 27, 1964, a petition to review and set aside the order to cease and desist issued against it on November 22, 1963, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of The Atlantic Refining Company, Inc., a corporation, Docket No. 7471;" and a copy of said petition having been served upon respondent; and the respondent having thereafter filed in this Court a certified list of the record in said proceeding; and the matter having been heard by this Court on briefs and oral argument on December 9, 1964, and this Court having rendered its decision on April 12, 1965; affirming the order and opinion of respondent and calling for the presentation of an order of enforcement;

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the prayer of the aforesaid petition to set aside the order of the Federal Trade Commission as to the petitioner herein be, and it hereby is, denied;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the order to cease and desist of the Federal Trade Commission be, and it hereby is, affirmed, and that petitioner be, and

it hereby is, commanded forthwith to obey said order and to comply therewith.

By the Court.

/s/ Harry Phillips
/s/ George Edwards
/s/ Thomas F. McAllister
United States Circuit Judges

Entered:

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15745

The Atlantic Refining Company, *Petitioner,*

v.

Federal Trade Commission, *Respondent.*

Order

Upon consideration of the motion of petitioner to extend the time for filing a petition for rehearing in this case until May 30, 1965 and of the answer of respondent in opposition to the motion;

It Is Ordered that the motion of petitioner be and it is granted and the time is extended accordingly.

Entered by order of the Court.

Carl W. Reuss
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15745

THE ATLANTIC REFINING COMPANY, a corporation,
Petitioner,

v.

FEDERAL TRADE COMMISSION, *Respondent.*

Order

Before: PHILLIPS, EDWARDS, Circuit Judges; MCALLISTER, Senior Circuit Judge.

The petition for rehearing in the above-styled case having been received and considered, and

The Court finding no grounds for granting said rehearing,

Said petition is hereby DENIED.

Entered by order of the Court:

CARL W. REUSS
Clerk

APPENDIX B

Opinion of the Seventh Circuit Court of Appeals in Sun Oil Co. v. Federal Trade Commission

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1964—APRIL SESSION, 1965

Petition for Review of Order of Federal Trade Commission

No. 14503

SUN OIL COMPANY, *Petitioner,*
v.
FEDERAL TRADE COMMISSION, *Respondent.*

August 19, 1965

Before SCHNACKENBERG and KILEY, *Circuit Judges,* and GRANT, *District Judge.*

GRANT, *District Judge.* On November 8, 1957, the Federal Trade Commission (Commission) issued its complaint against the Sun Oil Company (respondent or Sun), a corporation, charging it with unfair methods of competition and unfair acts and practices in violation of § 5 of the Federal Trade Commission Act (Act), 38 Stat. 719, as amended, 15 U.S.C. § 45 (1964 ed.).[1] Thereafter, on April

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[1] Section 5 provides in pertinent part:

(a) (1) Unfair methods of competition in commerce, and unfair . . . acts or practices in commerce, are declared unlawful.

• • • •

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair . . . acts or practices in commerce.

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair . . . act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be

7, 1959, the Commission granted the motion of counsel supporting the complaint to amend same by adding a second count charging an additional violation of § 5 of the Act. As amended, Count I of the complaint alleged that an agency consignment agreement between Sun and its dealers was a fiction and subterfuge, and in fact was an agreement or combination to fix the resale prices of gasoline. Count II alleged that, assuming such consignment agreement created a valid agency, Sun engaged in a predatory pricing practice for the purpose of destroying competition or competitors, with the effect of unduly restraining and lessening competition. The hearing examiner, on May 17, 1962, entered an order directing Sun to cease and desist from such practices as alleged and complained of in Count I. He further ordered the charges under Count II of the amended complaint dismissed, from which action no appeal was taken. Upon Sun's appeal, the Commission modified

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to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. . . . If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by [this Act], it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. . . . After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require. . . .

the initial decision to conform to the views expressed by the Commission and, as so modified, adopted that decision.[2]

The Commission concluded:

> Under these circumstances we hold that respondent's consignment plan was unlawful not because it did not constitute a genuine consignment under the law of agency, but because the proof showed it to be a vertical and horizontal price fixing device in violation of the Federal Trade Commission Act.[3]

Accordingly, the Commission entered its final cease and desist order on November 22, 1963.[4] The case is now be-

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[2] The examiner's proposed order would have applied to all products sold by Sun. Upon Sun's challenge to the scope of the order, the Commission limited it to gasoline. Also at the request of Sun, the Commission modified the order to except contracts entered into in conformity with the McGuire Act amendment of Section 5 of the Federal Trade Commission Act, 66 Stat. 632, 15 U.S.C. § 45(a)(2)-(5).

[3] Sun's appeal was heard by a full complement of the Commission. Commissioner Anderson concurred in the result, believing that the opinion of the Commission should have given assurance that it was not attacking the general practice of consignment selling.

[4] Sun was ordered to cease and desist from:

> 1. Entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, arrangement, agreement, contract or conspiracy with any person or persons not parties hereto, to establish, fix, adopt, maintain, adhere to, or stabilize by any means or method, prices, terms or conditions of sale at which its gasoline is to be sold.
>
> 2. Establishing, maintaining, continuing, cooperating in, or carrying out, or attempting so to do, any plan, policy, program, or any consignment policy in combination with any other person or persons not parties hereto, for the purpose or with the effect of enabling respondent to establish or fix

fore this Court upon Sun's petition to review the Commission's order, pursuant to § 5(c) of the Act, 52 Stat. 113, 15 U.S.C. § 45(c) (1964 ed.). For reasons hereinafter set forth, we agree with the Commission and we affirm.

The facts in this case are not in substantial dispute. Respondent, Sun Oil Company, is a New Jersey corporation with its principal office and place of business located in Philadelphia, Pennsylvania. Respondent operates an integrated petroleum company engaged in the production, purchase and sale of crude oil, the refining of crude oil and its derivatives, and the sale and distribution of gasoline and other petroleum products in various states[5] of the United States and foreign countries. It is one of the nation's leading producers and marketers of gasoline and enjoys wide public acceptance. Sun has refineries in Pennsylvania and Ohio and markets its products through wholesale distributors, company owned and operated stations and independent dealer stations. It distributes gasoline under the brand name "Blue Sunoco" through approximately 8,900 outlets in the United States and Canada, and its 1956 gross petroleum sales exceeded $731,000,000.

The market area involved in this proceeding is comprised of the metropolitan areas and surrounding contiguous territory of the cities of Norfolk, Portsmouth and Virginia Beach, Virginia (sometimes referred to hereafter

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the prices, terms or conditions of sale at which its gasoline is to be resold by a dealer after purchase from respondent.

Provided, However, that nothing herein contained shall be construed to limit or otherwise affect any resale price maintenance contracts which respondent may enter into in conformity with Section 5 of the Federal Trade Commission Act, as amended by the McGuire Act (Public Law 542, 82nd Cong., 2nd Session, approved July 14, 1952).

[5] The states are in the general area east of Chicago. They include the New England and Middle Atlantic States, and Ohio, Michigan, Illinois, Indiana, Florida and West Virginia. Sun markets only to a minor degree in South Carolina and Georgia.

as the Norfolk area). The period covered by the complaint is November, 1956, through April, 1959.

Present in the relative market area were several military exchanges selling major-brand gasoline at prices substantially below those prevailing elsewhere in the Norfolk area. In 1956 there were 12 such Navy exchange stations plus several other PX stations. They normally posted prices which were from four to five cents below the prevailing prices of major brands for regular gasoline. However, only authorized military personnel and their dependents could purchase at such exchange stations. With what the hearing examiner aptly described as a "universe" of approximately 100 million gallons of gasoline a year in the Norfolk area, the Navy exchanges accounted for approximately 8 million gallons thereof during the relevant time period.

In addition to the Naval exchanges, in 1956 there were 21 private-brand stations in the area. They normally and customarily posted a price for regular gasoline two cents below the prevailing price at the stations of the major oil companies. During the period in question, the private-brand stations accounted for about 9 million gallons of the same universe.

As the hearing examiner found, the Norfolk area was an unstable market in which depressed prices occurred spasmodically. There were occasional price wars, and a price disturbance in one section, in time, usually would spread throughout the entire area.

Sun entered the gasoline market in the Norfolk area in 1946, marketing its gasoline exclusively through a wholesale distributor, Taylor Oil Company. Taylor sold Sun gasoline at prices equal to the lowest posted by the private-brand operators. As a result, the purchasing public did not think of Sun's gasoline as a major brand, and was accustomed to purchasing it at the same price level as the private brands.

In September, 1954, Sun took over the operation from Taylor. At that time Sun began to open its own stations, leased to independent dealers, and unlike its operation under Taylor, operated as a major, with its dealers and company-operated stations generally posting the prices prevailing at the stations of the other major oil companies. At the time Sun took over from Taylor, its sales of gasoline products constituted about 6 percent of the overall market.[6] Sun commenced operations with fewer stations[7] and sold at the same prices as majors. This resulted in a smaller share of the market as well as less gallonage per station than Taylor enjoyed.[8]

After taking over from Taylor and prior to November 5, 1956, Sun sold its gasoline to retail dealers, who were independent contractors operating filling stations. Sun and such independent dealers entered into contracts providing for the sale of gasoline and other petroleum products by Sun to the dealers, and also entered into leases of the stations from Sun to the dealers. The agreements required the purchase of specified minimum amounts of gasoline. The leases contained a specified base monthly rental plus an additional rent of one-half cent per gallon sold. The computation of the specified base rental was based upon Sun's estimate of the potential gallonage the station might be expected to sell. Such estimates (and hence such base

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[6] Taylor's share of the market was approximately 7.4% in 1951, 6.5% in 1952, 7.0% in 1953, and 6.0% in September, 1954.

[7] Taylor had 34 stations in July, 1954. In early 1955 Sun had 12-14 stations, but gradually increased the number to 29 by October, 1956.

[8] In July, 1954, Taylor's 34 stations were averaging 21,272 gallons per month per station. In early 1955 Sun averaged 20,000 per month per station. However, as it increased the number of stations, the gallonage per station decreased.

In 1955, Sun accounted for only about 2.65% of the market. It advanced to 3.85% by 1956.

rental figures) were in all instances substantially in excess of the actual gallonage achieved. At nearly every station the actual gallonage sold was approximately one-half of the estimated potential. As a result, the stated base rental in each lease was substantially in excess of what it would have been, computed on the basis of the actual gallonage, and substantially in excess of what a dealer could afford to pay.

The leases were for year-to-year periods. At the time of the execution of the original lease, and every three months thereafter, an amendment to the lease was executed, reducing the base rent to a figure in most cases slightly less than half of the base rent set forth in the lease. In the event that such a quarterly amendment to the lease was not entered into, the rent set forth in the original lease immediately became effective. As was found by the hearing examiner, this situation gave Sun a potential power of coercion over its dealers because, if a quarterly amendment was not executed, the rental immediately more than doubled, which would probably force the dealer out of business. This could occur if the dealer declined to execute such a quarterly amendment to the lease, or if Sun chose not to execute such an amendment for any reason, including lack of cooperation.[9]

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[9] Such contractual arrangements have been noted here to illustrate the nature of the pre-existing relationships between Sun and its dealers. This relationship, in great part, led the hearing examiner to note that the bargaining between Sun and the dealers concerning consignment was conducted hardly as equals. However, the record in this case gives no indication, and the Commission did not find, that Sun ever used or explicitly threatened to use, with regard to its consignment agreements, its inherent power over Sun dealers through the quarterly amendments to the basic lease rentals and the contractual requirement to purchase a specified minimum amount of gasoline. For an important case involving this form of coercion, which is discussed below at some length, see *Simpson* v. *Union Oil Company of California*, 377 U.S. 13 (1964).

During late October and early November, 1956, a localized price disturbance occurred in Norfolk on upper Hampton Boulevard in a few blocks' stretch near the seven military exchange stations clustered in that area at the Naval Base. Several major stations, namely, Cities Service, Esso, Pure, Shell and Texaco, posted prices three cents under the major price generally prevailing in the Norfolk area. There was one Sun station located in the same general neighborhood.[10]

On November 5, 1956, as a result of this price disturbance, Mr. Southard, Norfolk District Manager of Sun, called all of the Sun dealers to a meeting at his office. Southard explained the details of Sun's commission consignment plan to the dealers, pointing out to them the

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[10] Except for the price disturbance on upper Hampton Boulevard, the prevailing major price in the Norfolk area was 30.9 cents, the prices at the military exchanges were 25.9 cents in Norfolk and 26.9 cents in Portsmouth, and the prevailing private-brand price was 28.9 cents. Although the price disturbance was limited to upper Hampton Boulevard, and had little if any effect on any of the Sun stations other than the one in that neighborhood, the nearest being approximately three miles away while the Sun stations in Virginia Beach were over 20 miles away, Sun advised the dealers that it intended to adopt the consignment plan throughout the entire Norfolk area and reduce the price to 27.9 cents, that posted by the other majors on upper Hampton Boulevard.

The hearing examiner found that Sun's area-wide reduction necessarily had the effect of spreading the price war throughout the entire area. Within a few days of the Sun reduction, the other major dealers met Sun's price and the private-brand operators reduced their prevailing price to 25.9 cents, attempting to restore the 2-cent differential. Prices continued to decline for several months. Each time that Sun and the other majors reduced their prices, the private brands in general posted a price two cents lower. However, in the latter part of March, 1957, the private brands apparently gave up the fight and posted one cent below Sun's prevailing prices. Shortly thereafter, in April, the prices at most Sun stations returned to the pre-price-war level of 30.9, and the private brands posted a price of 29.9.

situation on Hampton Boulevard, the declining gallonage per station, the fact that Sun had not achieved a share of the market comparable to that enjoyed under Taylor, the need to be more competitive in price with the military exchanges and the private-brand stations. He also indicated the probable necessity in the near future of Sun's posting a price within one cent of the prevailing private-brand price and an intention of maintaining such a differential no matter how low the private brands might reduce their prices.

Southard explained to the dealers that under the consignment plan they would be company agents for the sale of gasoline only, the company would retain title to the gasoline, establish the prices to be posted, and pay the dealers a minimum commission of 4.5 cents per gallon.[11] This was 1.6 cents less than the 6.1 cent margin the dealers were then receiving. Thus, Sun gave its dealers the altern-

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[11] The proposed consignment agreement constituted a written amendment to the sales agreement. By its terms it purported to retain title to the gasoline in Sun, provided for deliveries of gasoline to the dealer upon consignment as an agent, Sun fixed the prices at which the gasoline was to be sold, and until August of 1957 the amendment contained a specified minimum commission after which time the minimum commission fee was to be set at the discretion of Sun. Sun purchased the gasoline already in the dealers' tanks. The gasoline in the tanks was measured each time the posted price was changed by Sun, and the dealers were required to account for that sold at the previous price.

Under this arrangement, the dealer was to act as a commission agent in the sale of gasoline although he remained an independent dealer in the sale of all other products and services. The dealers were required to segregate the funds from the sale of gasoline, but in fact never did so. All risk of loss or shortage was on the dealer. Collateral deposit agreements which the dealers previously had entered into as independent contractors to secure the payment of certain indebtedness were amended also to secure Sun for the payment of the consigned gasoline. The consignment agreements were terminable on five day's notice except for defaults which made them terminable upon 24 hours' notice.

ative of accepting commission consignment or continuing to purchase gasoline at the established tankwagon price (the posted price to dealers and commercial users) and posting whatever retail price they saw fit as independent dealers. But because Sun intended to reduce the posted price at its own stations and those which went on consignment to 27.9 cents, and the tankwagon price was 24.8 cents and was to remain unchanged, the dealers who rejected consignment and continued to post a price of 30.9 cents would be unable to achieve sufficient gallonage to survive, while those who met the price of 27.9 cents would realize a margin of only 3.1 cents per gallon, less than the 4.5 cent minimum commission offered by Sun. In other words, a Sun dealer not participating in the commission consignment arrangement not only would have to compete with the lower prices of other brands of gasoline, but also would be faced with the lower prices of Sun dealers on consignment. As Southard testified before the hearing examiner, a dealer who refused consignment might be required to sell at a loss to meet the prices of Sun's consignees.

All of the dealers in the Norfolk area, save one, accepted commission consignment on November 5, 1956. Mr. Williams, who owned his own station in Portsmouth, held out for nearly three months during which time he was required to pay the tankwagon price of 24.8 cents per gallon. Sun and the other major competitors in his neighborhood reduced the posted prices to 24.9 cents, at which price he would have netted one-tenth of a cent per gallon. Williams posted 29.9 cents, and necessarily sold little gas. On February 1, 1957, he too accepted commission consignment.[12]

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[12] Inasmuch as Williams was the only hold-out from Sun's offer of commission consignment, his experience and testimony was considered peculiarly important with regard to the question of the voluntariness of the dealers' acceptance of the plan. Actually, however, the testimony of Williams at the hearing shed little light

It does not appear that respondent, Sun Oil Company, disputes this factual gackground. But it certainly does dispute the principal conclusions drawn therefrom. Sun has consistently contended that its commission consignment plan was a traditionally legitimate, bona fide marketing method, freely contracted, and designed to assist dealers and itself achieve better competitive status in a limited but unstable market area.

The Commission's chief conclusion was stated as follows:

> . . . (I)t is clear that on or about November 5, 1956, respondent and various or all of its dealers met and discussed arrangements for fixing and maintaining retail gasoline prices in the Norfolk area, and that a combination or conspiracy was organized to take action with respect to maintaining such prices. . . .
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> Thus respondent's consignment contracts were not separately and individually negotiated with each of its dealers. Rather the dealers were called together in groups. Sun then acted as a necessary conduit and clearing house through which the dealers among themselves and in each other's physical presence could and did pledge to fix prices horizontally; Sun, in the presence of the dealers, pledged to fix prices vertically.

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on this issue. At one point he stated that he did not initially go on consignment because of a misunderstanding of certain details of the plan. Williams owned his own station and apparently was under the impression that, if he accepted consignment, his property would be subject to certain "holds or attachment(s)" by Sun. When finally informed that this impression was incorrect, he went on consignment. On the other hand, when asked whether he felt he had any choice when he eventually went on consignment in February, 1957, Williams stated he did not. Later he testified that he felt the owner of a business had the "privilege of putting the price", and then added that "when you put a price you certainly have to be in competition and if you can't beat them you have to join them."

> The dealers attending and participating in the meetings, at least tacitly, agreed among themselves and with respondent to the taking of specific action on the maintaining of retail prices in the market. . . . (T)here is no doubt that Sun and its dealers wished and agreed to hold steadfastly to a uniform price line. . . . Sun . . . did not content itself with unilateral vertical arrangements but instead joined its dealers in horizontal arrangements which wiped out any slight opportunity for independent market action through price variances of any of its retail dealers. . . .
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> . . . The consignment arrangement was a fiction and a subterfuge in that it was simply a device by which the unlawful price fixing arrangement was to be implemented.

The Commission finally concluded that respondent's consignment plan was "a vertical and horizontal price fixing device" which constituted "an unfair method of competition and unfair practice in violation of the Federal Trade Commission Act." We agree and we affirm.

We start, of course, from the premise that so far as the Sherman Act and the Federal Trade Commission Act are concerned,[13] a price-fixing combination is illegal per se.

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[13] The courts have construed the Federal Trade Commission Act as being *in pari materia* with the Sherman and Clayton Acts, *Menzies* v. *Federal Trade Commission*, 242 F. 2d 81 (4th Cir. 1957), cert. den. 353 U.S. 957 (1957), and have allowed the use of cases decided under any of the antitrust laws in dealing with cases brought by the Commission. *Federal Trade Commission* v. *Beech-Nut Packing*, 257 U.S. 441, 453 (1922); *Federal Trade Commission* v. *Motion Picture Adv. Service Co.*, 344 U.S. 392, 394-395 (1953). Thus it is that violations of the Sherman Act have been held to constitute violations of Section 5 of the Federal Trade Commission Act. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 690 (1948); *National Macaroni Manufacturers Association* v. *Federal Trade Commission*, 345 F. 2d 421, 427 (7th Cir. 1965).

United States v. *Paramount Pictures, Inc.*, 334 U.S. 131, 143 (1948); *United States* v. *McKesson & Robbins*, 351 U.S. 305, 308 (1956); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-223 (1940); *National Macaroni Manufacturers Association* v. *Federal Trade Commission*, 345 F.2d 421 (7th Cir. 1965). As such, the illegality of price fixing does not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable. Nor does it make any difference "whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or to decrease prices." *United States* v. *McKesson & Robbins*, supra at 309-310. It is also not important "that the prices . . . were not fixed in the sense that they were uniform and inflexible," nor is the machinery employed by a combination for price fixing material. *United States* v. *Socony-Vacucm Oil Co.*, supra at 222-223.

As already noted, the Commission found that two price fixing conspiracies existed—a horizontal one among all the dealers accepting consignment, and a vertical one between Sun and each of the dealers accepting consignment. The former was inferred from the pattern of price fixing disclosed in the record. We think there was adequate foundation for such a finding by the Commission. It is well-settled that findings of fact by the Commission, including whether a price fixing agreement was made and performed, if supported by substantial evidence, are conclusive. *National Macaroni Manufacturers Association* v. *Federal Trade Commission*, supra at 426; *National Lead Company* v. *Federal Trade Commission*, 227 F.2d 825, 832-833 (7th Cir. 1955), rev'd on other grounds, 352 U.S. 419 (1957); *Fort Howard Paper Co.* v. *Federal Trade Commission*, 156 F.2d 899, 906-907 (7th Cir. 1946), cert. den. 329 U.S. 795 (1946); *Phelps Dodge Refining Corp.* v. *Federal Trade Commission*, 139 F.2d 393, 395 (2d Cir. 1943).

The weight to be given to the facts and circumstances, as well as the inferences reasonably to be drawn therefrom, is for the Commission. *National Macaroni Manufacturers Association* v. *Federal Trade Commission,* supra at 426; *Federal Trade Commission* v. *Pacific Paper Association,* 273 U.S. 52, 63 (1927); *Independent Grocers A.D. Co.* v. *Federal Trade Commission,* 203 F.2d 941, 945 (7th Cir. 1953). A price fixing agreement and the existence of a price fixing conspiracy may be inferred or implied from the acts and conduct of the parties, as well as from the surrounding circumstances. *National Macaroni Manufacturers Association* v. *Federal Trade Commission,* supra at 426-427; *National Lead Company* v. *Federal Trade Commission,* supra at 832-833; *Triangle Conduit & Cable Co.* v. *Federal Trade Commission,* 168 F.2d 175, 179-180 (7th Cir. 1948), aff'd sub nom. *Clayton Mark & Co.* v. *Federal Trade Commission,* 336 U.S. 956 (1949); *Goodman* v. *Federal Trade Commission,* 244 F.2d 584, 602 (9th Cir. 1957); *Allied Paper Mills* v. *Federal Trade Commission,* 168 F.2d 600, 606 (7th Cir. 1948), cert. den. 336 U.S. 918 (1949).[14]

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[14] The evidence taken by the hearing examiner was that, at the meetings of November 5, 1956, and after the consignment plan had been explained and offered to the dealers by Southard, there was a general discussion among the dealers themselves as to the pros and cons of the proposition. Conversations among the dealers took place both in and out of Southard's presence. Of particular import to the dealers was whether they should stay within one cent of the independents—also discussed at this time—for it was clear, as the Commission found, that the extent to which such a uniform reduction was to be maintained, "cooperation and participation by all was necessary." At the conclusion of the discussions, all dealers present signed consignment agreements. On the afternoon of the day the contracts were signed, Sun prices (with three exceptions) were dropped three cents to 27.9 cents per gallon, the proffered price. Thus supported was the finding of the Commission that "there was an interdependence in the dealers' decisions to participate in respondent's consignment plan" amounting to a horizontal price fixing device in violation of the Federal Trade Commission Act.

On the other hand, the vertical conspiracy—that between Sun and each of the dealers accepting consignment—was evidenced by express written agreements and was plainly established. In fact, Sun readily admits that the commission consignment contracts included a provision whereby Sun was to fix prices and, moreover, acknowledges that it did so while the consignment plan was in effect. Sun defends this method of vertical price fixing by reference to the traditional notion of the nature of consignment selling and by noting that the antitrust laws condemn only the fixing of prices on articles of commerce to be *resold* by another and leave the real seller or owner of the goods, in whom title rests immediately prior to sale, entirely free to fix any price he might see fit.

Sun's argument in this respect is as follows: In the judicial development of Sections 1 and 2 of the Sherman Act, the general rule evolved that vertical arrangements for retail price fixing[15] are illegal. But to this general rule, the Supreme Court recognized at least one significant exception, namely, that while vertical arrangements whereby goods sold to dealers can be resold only at prices fixed by the manufacturer-seller are considered illegal restraints of trade, sellers who *consign* their products to *agents* are free to set the price at which their products may be sold. The leading case on the validity of the consignment device in retail price maintenance is *United States* v. *General Electric Company,* 272 U.S. 476 (1926), wherein the General Electric Company attempted to fix the retatil price of incandescent lamps, upon which it held an exclusive

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[15] The terms "vertical price fixing" and "resale price maintenance" are often used interchangeably. Resale price maintenance has been defined as " 'pricing through agreements or conspiracies between two or more persons operating at different levels of the same production-distribution-consumption process.' " Kronstein, Modern American Antitrust Law 145 n. 1 (1958), quoting from Kronstein & Miller, Regulation of Trade 850 (1953). The terms are used interchangeably in the course of this opinion.

patent, by converting all its dealer outlets into its own agents and requiring dealer inventory to be placed on consignment. There the Supreme Court unanimously held that "genuine contracts of agency . . . , however comprehensive as a mass or whole in their effect," did not violate the Sherman Act, because the Act did not prohibit the "owner of an article, patented or otherwise," from disposing of it "directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer."[16] *Id.* at 488. Sun further contends that the Supreme Court, in the later case of *Standard Oil Company* v. *United States,* 337 U.S. 293, 310 (1949), suggested that a marketer of gasoline could employ agency relationships with its dealers as a method of selling in a market area. There being no "resale" by the consignee, Sun concludes, this form of marketing is immune from the rule against vertical price control, and to rule to the contrary would be to impinge upon the integrity of the "ancient, lawful, broadly-used business practice" of consignment selling.

The Commission, however, in support of its order, distinguished *General Electric* from the instant case on the ground that this price fixing was horizontal as well as vertical. We think this distinction was well-taken. In *United States* v. *Masonite Corporation,* 316 U.S. 265 (1942), the Supreme Court held invalid the use of an agency to effect horizontal price maintenance in the dis-

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[16] Inasmuch as the *General Electric* case was concerned solely with a patented product, the language "patented or otherwise" is clearly dictum. However, because of such dicta in *General Electric,* it has been thought by many that the consignment device for resale price maintenance was not inconsistent with the antitrust laws no matter how large the system involved and regardless of the non-existence of a patented product. Thus it is that "resale price maintenance of gasoline through the 'consignment' device is increasing." *Simpson* v. *Union Oil Company of California,* 377 U.S. 13, 19 (1964), citing H.R. Rep. No. 1157, 85th Cong., 1st Sess., pp. 6-7.

tribution of patented products. Masonite, the holder of a patent on hardboard, entered into agency agreements with competitors[17] under which they were made del credere agents, the product was shipped on consignment, title remained in Masonite, and Masonite established the prices at which the product was to be sold. The existence of a valid agency[18] did not deter the Court from finding an antitrust violation: "We assume . . . that the agreements

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[17] The fact that *Masonite* involved competitors rather than vertical customers, as was the case here, is not a factor upon which that case can be distinguished. The Supreme Court has stated clearly that the elimination of competition among retail distributor purchasers by price-fixing is illegal per se, just as is such price fixing among competitors. *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911); *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944). The rule is applicable here where Sun retail dealers were, to greater or lesser degree, in competition with each other. Cf., *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U.S. 211, 215 (1951).

[18] In holding Sun's consignment plan unlawful, the Commission did not find that "it did not constitute a genuine consignment under the law of agency." Supra, text at note 3. Yet there were aspects of the relationship between Sun and its dealers after consignment was put into effect that did not conform to the purported agency. For example, a portion of the rental paid to Sun by dealers who leased station premises was for the storage of gasoline on said premises. This portion of the lease agreements was never amended, even though after consignment title to the gasoline did not pass to the dealers. Thus, after consignment, the dealers continued to pay rent for the storage of gasoline, gasoline which was not theirs. Secondly, the dealers continued to hold themselves out as "proprietors", not as agents of Sun, after going on consignment, again in accordance with the unamended pre-consignment lease agreements. And finally, under local law the dealers were required to pay a retail merchants' license to sell gasoline. After the adoption of commission consignment, they continued to pay this license or tax until 1958, when Sun began to pay it after the tax officials called it to Sun's attention. Sun now contends this was the result of mere oversight. However, Sun did not go so far as to refund the license payments theretofore made by the dealers.

constituted the appellees as del credere agents of Masonite. But that circumstance does not prevent the arrangement from running afoul of the Sherman Act." *Id.* at 277.

In striking down the horizontal conspiracy in *Masonite* for the fixing of prices, the Court was unmoved by the fact that each participant, other than Masonite, in negotiating and entering into the first agreements acted independently of the others, negotiated only with Masonite, desired agreement regardless of the action that might be taken by any of the others, did not require as a condition of its acceptance that Masonite make such an agreement with any of the others, and had no discussion with any of the others. Stating that "prices are fixed when they are agreed upon," *Id.* at 276, the Court went on to say (quoting *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208, 226-227 (1939)):

> It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. . . . It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act. *Id.* at 275.

While we have followed the Commission in holding the decision in the *General Electric* case distinguishable from that now before us on the basis that we are here concerned with horizontal as well as vertical price control, additional support for this position—not then available to the Commission—is now available to us by virtue of the recent decision in *Simpson* v. *Union Oil Company of California,*

377 U.S. 13 (1964).[19] In *Simpson,* the Court apparently for the first time, sustained a direct attack on the "exception" to per se illegality of vertical price control theretofore thought to have been carved out by *General Electric.* Rather than overruling *General Electric* expressly, however, Mr. Justice Douglas, speaking for a majority of five, chose to limit it to its special facts, emphasizing that the consignment considered in that case covered a patented product.[20] Thus limited, it is now undoubtedly the law

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[19] The essential facts in *Simpson* are as follows. In conjunction with renewable one-year leases on its retail outlets, Union Oil entered into consignment agreements with its lessee dealers, under which it controlled the retail price and retained title to and paid all property taxes on the consigned gasoline until it was sold. The dealer, on the other hand, received a guaranteed commission from Union, was obliged to carry personal liability and property damage insurance, was responsible for any ordinary losses of consigned gasoline, and paid his own costs of operation. Two months before his lease expired, Simpson, Union's dealer-lessee, lowered his price on regular gasoline two cents below Union's authorized price. Union then refused to renew the lease and the agreement expired, Union resuming possession of the premises. Thereafter, Simpson brought suit for damages under § 4 of the Clayton Act for violation of §§ 1 and 2 of the Sherman Act. The district court granted Union's motion or summary judgment, the Court of Appeals affirmed, and the Supreme Court reversed.

[20] The view of Mr. Justice Douglas that the existence of a patented product constituted the *"ratio decidendi"* of *General Electric* has been severely criticized. See, e.g., *Simpson* v. *Union Oil Company of California,* 377 U.S. at 25 (dissenting opinion of Mr. Justice Stewart); *Lyons* v. *Westinghouse Electric Corporation,* 235 F. Supp. 526, 535 n. 1 (S.D. N.Y. 1964); Handler, *Seventeenth Annual Review of Antitrust Developments—1964,* 19 Record of N.Y.C.B.A. 379 (1964); Handler, *Recent Antitrust Developments—1964,* 63 Mich. L. Rev. 59, 60 (1964). Nevertheless, it seems clear that *General Electric* could be limited to its special facts and need not be overruled for the reason that all references therein to non-patented products were dicta. See note 16, supra.

that, with regard to unpatented products, no such "exception" exists.[21]

This is not to say that *Simpson* should be construed to hold all consignment agreements illegal per se under the antitrust laws. At this juncture, the best course is to view *Simpson* limited by its own particular factual context, and to proceed case-by-case where consignment systems resulting in vertical price control are involved.[22] This being so, it is well to acknowledge the fact that the Court in *Simpson,* after disposing of *General Electric,* observed that "by reason of the lease and 'consignment' agreement dealers are coercively laced into an arrangement under which their supplier is able to impose noncompetitive prices on thousands of persons whose prices otherwise might be competitive,"[23] and held, in reliance on *United States* v. *Parke, Davis & Co.,* 362 U.S. 29 (1960), that "resale price maintenance through the present, coercive type of 'consignment' agreement is illegal under the antitrust laws. . . ." 377 U.S. at 24.

In this case, the Commission did not make a finding of the type of coercion evident in *Simpson.* It is clear that the hearing examiner did find a form of "economic coercion", but the Commission did not appear to rely upon it in any way.[24] Nor did the Commission find that form of

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[21] "Whether . . . *(Simpson)* . . . amounts to overruling *General Electric* or merely limiting it is a matter of semantics. The practical effect is the same, whichever word one uses. I cannot escape the conclusion that where no controlling patents are present, the rule laid down in *General Electric,* at least for the future, is no longer law." *Lyons* v. *Westinghouse Electric Corporation,* 235 F. Supp. 526, 535 (S.D. N.Y. 1964).

[22] See *C.B.S. Business Equipment Corp.* v. *Underwood Corporation,* 240 F. Supp. 413, 425 (S.D. N.Y. 1964), for a similar application of Simpson.

[23] 377 U.S. at 21.

[24] With regard to coercion, the Commission merely found that "a combination or conspiracy was instituted even though dealers were not uniformly desirous of entering into the arrangement proposed by the respondent." The word "coercion" is not even present in the Commission's opinion.

coercion found in *Atlantic Refining Co.* v. *Federal Trade Commission,* 344 F.2d 599 (6th Cir. 1965) wherein the gasoline dealer was offered the "Hobson's Choice" of "economic disaster or the consignment agreement."[25] 344 F.2d at 607. Therefore, at least for the present, we cannot hold the facts presented by this record controlled by *Simpson.* This is so for the reason that, even though we might believe existed in this case the type of coercion that *Atlantic Refining* brought within the purview of *Simpson*—as did the hearing examiner, "we recognize that it is the Commission which has the ultimate responsibility of finding the facts and that it is the findings of the Commission that we are authorized to review." *Folds* v. *Federal Trade Commission,* 187 F.2d 658, 660 (7th Cir. 1951); *Bond Crown & Cork Co.* v. *Federal Trade Commission,* 176 F.2d 974 (4th Cir. 1949). However, this is not to say that *Simpson* is not at all apposite to the instant situation, for it is. Just as *Simpson* is not to be read to hold all consignment plans illegal per se, by limiting that case to its facts does not mean that all consignment plans not coercively induced are legal per se. Our understanding of *Simpson* compels us to scrutinize closely this and all other such forms of consignment marketing in this industry and others.

Thus, in sustaining the order of the Commission against respondent, Sun Oil Company, we hold, in principal reliance upon *United States* v. *Masonite Corporation, supra,* and *Simpson* v. *Union Oil Company of California, supra,* that where a commission consignment plan such as this, otherwise valid as measured by the law of agency, and even though not coercively induced, results in horizontal as well as vertical price control, such consignment plan

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[25] This is particularly striking in view of the findings of the hearing examiner. Supra, text at note 9 and text preceding note 11. It is also noteworthy that the Commission's opinion in *Atlantic Refining* was handed down on May 16, 1963, just a day after it handed down its opinion in this case.

constitutes an illegal price fixing device and an unfair method of competition and unfair practice in violation of the Federal Trade Commission Act. Such a commission consignment plan as we have here we find to be illegal per se, for its evil—like the plan condemned in *Simpson*—"is its inexorable potentiality for and even certainty in destroying competition in retail sales of gasoline by . . . 'consignees' who are in reality small struggling competitors seeking retail gas customers." 377 U.S. at 21.

In so holding, we are not deterred by respondent's contention that finding an antitrust violation on these facts would render nugatory for commercial purposes the "ancient, lawful, broadly-used business practice" of consignment selling. Here, respondent seems to be of the position that a valid agency and an antitrust violation are mutually exclusive, and that the former constitutes an absolute defense to a charge of the latter. In view of the policy considerations at stake, we do not approve of such rationale, and, in accordance with the Commission, find both to have existed. "The interests of the Government . . . frequently override agreements that private parties make. Here we have an antitrust policy expressed in Acts of Congress. Accordingly, a consignment, no matter how lawful it might be as a matter of private contract law, must give way before the federal antitrust policy." 377 U.S. at 18.

Nor are we deterred by the contention of respondent that the Commission lacked jurisdiction in this matter because the gasoline retailed to the consuming public pursuant to the commission consignment agreements did not constitute sales "in commerce" within the meaning of § 5 of the Federal Trade Commission Act. On the contrary, the Commission found that in the course and conduct of its interstate business, Sun transports its gasoline in tank cars, tankers and trucks from its different refineries, terminals, and distribution points, located in various states, to retail dealers in the Norfolk area. It

held that the agreement or combination between Sun and its dealers fixing the retail prices was engaged in the course of such business and, therefore, in interstate commerce. We agree.

Sun urges the case of *Federal Trade Commission* v. *Bunte Bros., Inc.,* 312 U.S. 349 (1941), as decisive here in its favor. We find it to be clearly distinguishable. In that case, quite contrary to this, the unfair methods of competition sought to be regulated by the Commission were admittedly confined to activities wholly within the State of Illinois relating to goods manufactured in Illinois and which had been at no time in interstate commerce. Cf. *Holland Furnace Company* v. *Federal Trade Commission,* 269 F.2d 203, 209-213 (7th Cir. 1959), cert. den. 361 U.S. 932 (1960). In this case, Sun shipped its gasoline products to its Norfolk area dealers from points outside the State of Virginia. Such interstate character of the distribution process did not cease merely because the gasoline in question may have come to a temporary rest in storage tanks in the Norfolk area. *Standard Oil Company* v. *Federal Trade Commission,* 340 U.S. 231, 238 (1951).

Furthermore, Sun's attempt to confine the scope of this consignment plan to the 25 dealers in the Norfolk area misconceives the nature and purpose of Commission proceedings. The Federal Trade Commission Act empowers the Commission to prohibit any practice "which (has) restrained competition or might lead to such restraint if not stopped in its incipient stages." *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683, 693 (1948); *Federal Trade Commission* v. *Raladam,* 316 U.S. 149, 152 (1942). The record in this case would indicate that Sun's consignment plan was adopted in its Norfolk District pursuant to general directives used to combat price wars wherever they might occur. Thus, the fact that, when used, this price fixing mechanism affected only local retail sales of gasoline surely cannot be controlling. Retail

sales, like price wars, are most always "local"—they were here and they were in Union Oil's "vast distribution system." 377 U.S. at 21. There is no doubt but that this consignment plan involved goods engaged in interstate commerce and was effected by a company policy conceived with a view to application wherever price disturbances affected its operations.

The order and opinion of the Federal Trade Commission is affirmed. An order for enforcement may be presented.

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 558

THE ATLANTIC REFINING COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–15a) is reported at 344 F. 2d 599. The decision and order of the Federal Trade Commission (App., *infra*, pp. 9–31) are not yet reported.[1]

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1965. A petition for rehearing was denied on June 14, 1965. The petition for a writ of certiorari was filed on September 10, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Petitioner has not included the Federal Trade Commission's decision and order in his petition for certiorari. For the convenience of the Court and the parties, the Commission's opinion is printed in the appendix to this brief.

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QUESTIONS PRESENTED

The court below affirmed the Federal Trade Commission's ruling that the Atlantic Refining Company unlawfully fixed the resale price of its gasoline by means of consignment agreements which it employed only during the course of "price wars" involving its retail dealers. The questions presented are:

1. Whether Atlantic's use of "consignment" for resale price maintenance is unlawful.

2. Whether the issuance of a cease and desist order here raises the question whether the *Simpson* decision was intended to be applied retroactively.

3. Whether the Commission's order is invalid because only three of the five members of the Commission participated in the decision and one of them dissented.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, provides in pertinent part:

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

STATEMENT OF FACTS

Petitioner (Atlantic) is a large refiner of gasoline and petroleum products, which it markets throughout a 17-State area. It sells its products to service stations and also to wholesalers who resell to service stations. The company has divided its sales territory into numerous pricing areas, and its policy is that there shall be one uniform retail price in each pricing area (R. 930a[1]). Under stable market conditions, this is

[1] "R." is the printed joint appendix below.

accomplished by the company's suggesting retail prices or requiring adherence to State fair trade laws (R. 822a, 587a). In 1956, Atlantic adopted a consignment plan designed to achieve the same price uniformity in marketing areas experiencing "price wars". Under this plan, when Atlantic sold directly to a service station, it retained title to the gasoline until resold to the consumer and set the retail price at which each "consignee" was required to sell (App., *infra,* pp. 15–16). In return, the consignee received a "commission" of slightly more than 4¢ per gallon of gasoline sold. Each dealer buying directly from Atlantic in the affected pricing area was given the choice of accepting consignment or continuing to buy gasoline from Atlantic at the normal wholesale price—which was substantially greater than the amount (the retail price less the commission) paid by consignees to Atlantic (App., *infra,* pp. 12–13). To control the prices of the non-direct-buying service stations, Atlantic offered its wholesalers a discount on gasoline provided they resold to retailers at a price fixed by Atlantic and the retailers resold to the public also at a price fixed by Atlantic (App., *infra,* p. 12).

A series of price wars erupted on the Delmarva Peninsula (comprising portions of the States of Delaware, Maryland, and Virginia) in 1957–1958, and Atlantic placed its consignment and wholesale discount plans into effect. The Federal Trade Commission in 1958 issued a complaint charging that in so doing Atlantic had violated Section 5 of the Federal Trade Commission Act by fixing retail gasoline prices. After full evidentiary hearings, the Commission entered a cease

and desist order. The court of appeals affirmed (Pet. 15a).

In its decision, which preceded this Court's decision in *Simpson* v. *Union Oil Co.*, 377 U.S. 13, the Commission found, first, that Atlantic's efforts to control the retail prices of dealers who bought from independent wholesalers constituted an unlawful conspiracy to fix prices (App., *infra*, pp. 23–25). The Commission also found that the consignment plan was, in reality, an illegal price-fixing device. It found that dealer acceptance of "consignment" was coerced since, for the affected dealers, the only alternative to consignment was economic death (App., *infra*, p. 13). Atlantic's argument that its consignment agreement was a *bona fide* marketing plan lawful under this Court's holding in *United States* v. *General Electric Co.*, 272 U.S. 476, was rejected on several grounds. In the *General Electric* case, the Commission noted, the agency agreement was used to market a patented product. Also, General Electric's consignment system was its regular method of marketing, whereas Atlantic used consignment only in areas experiencing price wars. Most important, Atlantic's consignment plan, far from being a *bona fide* marketing method, was adopted specifically to enable Atlantic to fix and control retail prices of its dealers during price wars (App., *infra*, pp. 20–22). Moreover, the Commission found that the consignment plan was unlawful as part of an overall attempt to control the retail prices of all Atlantic dealers, whether they acquired gasoline through distributors or directly from Atlantic (App., *infra*, pp. 24–25).

The Commission's order was appealed to the Court of Appeals for the Sixth Circuit. While the appeal was pending, this Court decided in the *Simpson* case that consignment agreements permitting a major gasoline producer to fix the retail prices charged by a large number of dealers violated the antitrust laws. The question of the applicability of *Simpson* to the present case was fully briefed to the court of appeals, which disposed of the major issues in this case on the basis of the *Simpson* decision (Pet. 1a). It also held that all of the Commission's findings were supported by substantial evidence (Pet. 14a), including the findings that the dealers were coerced into accepting consignment and complying with its terms (Pet. 13a–14a) and that consignment was part of an overall illegal plan to fix and maintain prices (Pet. 9a).

ARGUMENT

1. The court below correctly held that *Simpson* "seems definitive as to the principal argument at issue pertaining to whether consignment agreements may be used by a producer to fix and maintain retail prices" (Pet. 10a), noting that "[t]his case deals with the same industry and a parallel employment of a consignment agreement" (Pet. 12a). Petitioner's claim that the case is different because Union Oil applied coercion in securing the execution of its consignment agreements is without merit, in view of the finding by the Commission, upheld by the court of appeals, that Atlantic did in fact employ coercion. The court agreed with the Commission that Atlantic, by refusing to lower its price to the dealers during the "price war", in which retail gasoline prices were severely de-

pressed, had offered its dealers "only the choice of economic disaster or the consignment agreement"—a "Hobson's Choice", not a free choice (Pet. 14a).

Nor is there any merit to Atlantic's claim that this case is distinguishable from *Simpson* because the consignment plan here was utilized only in price wars. This fact, as the court below noted, "simply underlines the fact that this was indeed, as found by the Commission, a price-fixing mechanism" (*ibid.*), not a *bona fide* distribution method. Atlantic's further claim that it conceived of the consignment device as a nondiscriminatory method of enabling its dealers to remain competitive during price wars is refuted by the fact that it forced its consignee-dealers, against their wishes, to raise their retail prices (R. 853a). Finally, in *Simpson,* this Court expressly rejected the argument that a consignment plan should be permitted on the ground that it serves to protect dealers' profit margins during retail price disturbances, stating that it is "a justification similar to that traditionally advanced for resale price maintenance" (377 U.S. at 19–20, n. 6).[3]

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[3] There is no merit to Atlantic's suggestion (Pet. 17–19) that there is a conflict between the decision below and the decision of the Seventh Circuit in *Sun Oil Co.* v. *Federal Trade Commission* (350 F. 2d 624, Pet. 19a–42a) on the question whether presenting a dealer with a Hobson's choice between economic disaster or acceptance of consignment amounts to coercion. The Seventh Circuit declined to make a finding on the question whether Sun had employed coercion only because the Commission itself had made no such finding (Pet. 38a–39a). In the present case, the Commission made such a finding, and the court of appeals upheld it. The Seventh Circuit in *Sun* affirmed the Commission's ceases and desist order, as did the court below.

2. The court of appeals correctly held that the question of the retroactive application of *Simpson* is not presented by this case (Pet. 15a). The Federal Trade Commission's cease and desist order operates only prospectively; it does not involve any award of damages for past misconduct—the only situation in which this Court suggested that a question of the fairness of retroactive application might arise. Moreover, respondent's conduct was, as the Commission found, illegal under the law as it stood prior to *Simpson*. The Commission held that "respondent utilized the consignment system of marketing as a device to control prices admittedly to avoid the impact of the Clayton and Sherman Acts" (Pet. 9a); that it "very clearly desired to stifle price competition" among its dealers (Pet. 8a–9a); that the device was employed "as an integral unit of a horizontal and vertical price fixing scheme" (Pet. 9a); and that such conduct was not protected under the *General Electric* ruling.

3. Atlantic contends that because only three Commissioners participated in the decision, and one dissented, the Commission's order is invalid (Pet. 21–23). As the court below noted, however, the rules of the Federal Trade Commission have from the beginning provided for decision by the majority of panels of three members (16 CFR (1965 Cum. Supp.) 1.7). The Commission plainly had the power to enact such a rule for the conduct of its business. 15 U.S.C. 46(g); *Drath* v. *Federal Trade Commission*, 239 F. 2d 452 (C.A. D.C.), certiorari denied, 353 U.S. 917. See, also, *Frischer & Co.* v. *Bakelite Corp.*, 39 F. 2d 247

(C.C.P.A.), certiorari denied, 282 U.S. 852; *WIBC, Inc. v. Federal Communications Commission*, 259 F. 2d 941 (C.A. D.C.), certiorari denied, 358 U.S. 920.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
DONALD F. TURNER,
Assistant Attorney General.
ROBERT B. HUMMEL,
JOHN T. MARSHALL,
Attorneys.

JAMES MCI. HENDERSON,
General Counsel,
J. B. TRULY,
Assistant General Counsel,
ALVIN L. BERMAN,
RICHARD CAMPBELL FOSTER,
Attorneys,
Federal Trade Commission.

NOVEMBER 1965.

APPENDIX

United States of America

Before Federal Trade Commission

COMMISSIONERS:

Paul Rand Dixon, *Chairman*
Sigurd Anderson
Philip Elman
Everette MacIntyre
A. Leon Higginbotham, Jr.

Docket No. 7471

IN THE MATTER OF THE ATLANTIC REFINING COMPANY, INC.,* A CORPORATION

Opinion of the Commission

By MACINTYRE, Commissioner:

This matter is before the Commission upon the cross appeals of respondent and counsel supporting the complaint from the hearing examiner's initial decision in part sustaining and in part dismissing the charges of the complaint.

The complaint alleges that respondent, a major petroleum products marketing company, individually and in combination with others, engaged in practices which had the purpose and effect of unlawfully fixing and maintaining the resale prices of gasoline in violation of Section 5 of the Federal Trade Commission

* Respondent's correct name is The Atlantic Refining Company.

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Act. Although the complaint deals with essentially a single basic factual situation, it is divided into three counts. In Count I it is alleged that the respondent individually violated the Act by coercing and forcing its lessee-dealers through means of a system known as a "temporary consignment contract", to sell at uniform and non-competitive prices. Count II of the complaint incorporates all of the allegations of Count I by reference. This Count, however, charges a conspiracy between respondent and its unnamed lessee-dealers to fix and maintain uniform and non-competitive prices. The medium through which the alleged conspiracy was allegedly effected is the aforesaid "temporary consignment contracts" between respondent and the co-conspirator lessee-dealers. Count III incorporates all of the allegations of Counts I and II, and in addition charges a conspiracy between the respondent and its unnamed independent wholesale distributors of gasoline. The alleged vehicle of this conspiracy differs somewhat from that charge as existing between respondent and its lessee-dealers. Count III charges that uniform consumer resale prices were fixed and maintained by granting the co-conspiring distributors certain allowances or rebates which they were to pass on to their dealer customers who would agree to adhere to the prices fixed by respondent in its illicit practices involving its lessee-dealers.

The hearing examiner found that only Count III of the complaint had been sustained, and issued an order which directed the respondent to cease and desist from fixing or maintaining the "wholesale price" at which its products are sold by "wholesale distributors" or the retail price at which its products are to be resold by retail service stations owned or served by wholesale distributors. Complaint counsel are appealing the dismissal of Counts I and II of the com-

plaint, and respondent is appealing the finding and order with respect to the allegedly illegal practices charged in Count III.

* * * * *

The respondent is a Pennsylvania corporation, primarily engaged in the production, sale and distribution of gasoline and other petroleum products throughout a 17-state marketing area. Its "regular" gasoline is sold under the brand name "Atlantic", and its high test fuel under the name "Imperial". Respondent owns and operates refineries at Philadelphia, Pennsylvania, and Atreco, Texas. In 1956 its gross domestic sales of petroleum and chemical products, including sales of its consolidated subsidiaries, amounted to approximately $379,000,000.

The respondent markets its gasoline in two ways. It sells directly to the operators of retail gasoline service stations who either own and operate their own stations, or lease the premises from the respondent or others. The second marketing system entails sales to wholesale distributors who in turn resell to retail service station dealers. In the geographic area with which the facts of this case are concerned, respondent used both systems.

The controversy in this case centers chiefly in an area referred to by the examiner as the Delmarva Peninsula". As a glance at the map will show, the Delmarva Peninsula is that body of land which separates the Chesapeake Bay from the Delaware Bay and Atlantic Ocean. It acquires its name from the fact that it lies within the boundaries of the States of Delaware, Maryland and Virginia. In 1957 a gasoline price war erupted on the Peninsula. The allegedly unlawful acts and practices of this respondent were performed in connection with this price war.

The practices engaged in by the respondent in the Delmarva price war were not spur of the moment expedients but constituted the implementation of predetermined company policy. The respondent states "under price war conditions it is the policy and practice of respondent to assist its retail dealers to remain in business. It is likewise the policy and practice of respondent to assist its distributors in order that they may, in turn, sell to their retail dealers at a price which allows such retail dealers to be generally competitive and thus not suffer economically and competitively or be forced out of business."

* * * * *

Since, as aforesaid, the respondent utilized two methods of distribution, their "assistance" to dealers in a price-war area, was accomplished in different fashions. As alleged in Counts I and II of the complaint, on direct sales to retail service stations, the respondent utilized temporary consignment contracts. This procedure was devised and implemented by the company in early 1956. It provided: "When price war conditions prevail in a given competitive trade area so that the spread between the dealer [tank wagon] price of Atlantic gasoline and the prevailing service station price at comparable service stations is less than 4¢ per gallon, all Atlantic dealers * * *" will be offered the opportunity to "execute a contract sales agreement and become our contractors for the retail sale of Atlantic-owned gasoline".

It is important to note that the company's program as planned and implemented, did not entail forcing dealers, including lessee-dealers, operating on company-owned premises, to execute the consignment agreements but under the circumstances, such overt control was unnecessary. Any dealer faced with a

price-war situation was offered the consignment program or nothing. In other words, the company would not reduce its prices to him to enable him to independently set his own resale price and thereby meet competition as he saw fit. He was offered, in effect, "Hobson's Choice" of continuing to buy at the normal dealer price, entering a consignment agreement, or terminating all existing contractual relations with the respondent. As several of the dealer-witnesses testified, it was a case of either signing the consignment contract or going out of business. Respondent argues that the only coercive force present in the situation was engendered by the price war market conditions, which the record shows it did not create. But this is no answer. One cannot justify offering a hot poker to a drowning man by averring that the water was to blame. To the extent that the lessee-dealers had no alternative but economic death to entering a consignment-agreement with respondent, it must be found that they were pressured or coerced to enter such contracts and the hearing examiner's finding to the contrary is in error. However, there does not appear to be any evidence in this record that the respondent used its position of economic power over its lessee dealers to force them into entering the contract. Under the business conditions which existed, such pressure was unnecessary.

The basic charge made in Counts I and II of the complaint is that the consignment program as practiced by the respondent, resulted in illegal price fixing. The factual complex in which the allegedly illegal scheme was utilized is described by the hearing examiner at pages 13 and 14 of the initial decision. In summary, he found that from time to time during early 1957, the respondent surveyed the consumer prices charged by various gasoline companies' out-

lets in the Delmarva Peninsula. The survey disclosed that in respondent's areas 1 and 2, both in Newcastle County, Delaware, the major marketing companies' outlets were selling regular gasoline at prices ranging from 25.9 to 27.9 cents per gallon. In Kent County, Delaware (respondent's area 3), prices ranged from 25.9 to 28.9 cents. In Sussex County, Delaware (respondent's area 4), there were only two prevalent prices, 26.9 cents and 27.9 cents.

By June 1957 the respondent had already placed its consignment program into effect in its areas 1, 2 and 3 but had taken no action in this respect with respect to the Sussex County area.

In June 1957, Atlantic made another survey of the Delmarva Peninsula area and found that the majority of the major brand competitors in the areas 1, 2 and 3 were posting retail prices at 26.9 cents per gallon on regular gasoline. Effective June 26, 1957, respondent reduced the consumer price at its contract sales consignment stations in these areas from 27.9 to 26.9 cents per gallon.

By July 1, 1957, it appeared that most of the gasoline stations in the Sussex County areas were then posting a price of 26.9 cents per gallon for regular gasoline. The examiner found that the stations selling at this price included "11 Esso stations, 2 Gulf stations, 2 Mobil (Socony) stations, 5 Sunoco stations, 7 Amoco stations, 4 Cities Service stations, 8 Pure Oil stations, 3 Shell stations, 4 Sinclair stations, and 5 Texaco stations. Some of the retail dealers received rebates off their tank wagon price. It was reported that the Sun Oil Company was operating on a commission agreement plant similar to respondents."

At this time the Sussex County lessee-dealers were paying respondent 24.3 per cent per gallon for regular

gasoline. The examiner found that at this cost price, "Atlantic dealers and lessee-dealers could not compete with such low retail prices of their major competitors. They appealed to the respondent for relief." In response to this appeal, the respondent's representatives contacted the dealers and offered them the consignment agreement which respondent refers to as its "contract sales agreement."

There is no dispute concerning the basic details of the consignment program. The hearing examiner succinctly explains it at page 16 of his initial decision, in the following terms:

> "1. The Company will place gasoline on consignment with the dealer subject to prior approval by the Credit Department. At the time of each replenishment delivery, the volume of gasoline on consignment is to be brought to its original level. The dealer will settle in cash at the time of replenishment for the number of gallons equal to the replenishment delivery on the basis of Atlantic's posted service station price at the time at which the gasoline was sold, less a commission for Atlantic gasoline, representing 23% of the service station price for the product, excluding all taxes.
>
> "2. Atlantic will specify the service station price of gasoline posted by the dealer during the period of the consignment plan agreement, the dealer to be trustee of proceeds of sale.
>
> "3. Title to gasoline constituting any replenishment delivery shall not pass to the dealer."

The record reveals that respondent entered consignment agreements with 37 of its dealers in its area number 4 during 1957 and 1958. Two of these dealers were located in Maryland and the remainder in Delaware. Although the price war was over in Sussex County, Delaware, by September 13, 1957, dealers in that County remained under the consignment pro-

gram until as late as September 1958. The price war continued for a longer time in Newcastle and Kent Counties in Delaware, and thereto the consignment-agreements remained in effect during 1958.

There can be no doubt but that respondent, through the operation of this consignment program as above described was able to, and did, in fact, fix uniform retail prices for gasoline sold to consumers by its lessee-dealer service stations in its areas 1, 2, 3 and 4, located on the Delmarva Peninsula. But in order to maintain the prices established by the respondent through the consignment program, it was necessary to secure the compliance of these dealers who did not buy directly from respondents but through an intervening wholesale distributor. Respondent's announced policy on pricing is:

> "There will be only one retail price at all times in any given pricing area. This will be called Atlantic's posted retail price.
>
> "A reasonable relationship will always be maintained between posted retail price, posted dealer tank wagon price, and posted consumer tank wagon price."

Since the dealers buying from a wholesale distributor were his customers and not those of the respondent, control over their prices could only be maintained and secured by enlisting the cooperation of the wholesale distributor who served them. The hearing examiner found that the respondent did secure the cooperation of its sometimes unwilling distributors, and thereby conspired with them to fix prices as charged in Count III of the complaint and in violation of Section 5 of the Federal Trade Commission Act.

The system pursued was to grant the wholesale distributor a lower price to enable him to in turn sell at a lower price to such dealers as would maintain the

consumer price set and fixed by respondent for its direct buying dealers operating under the consignment plan. The simple mechanics of the pricing procedure utilized are explained in an Atlantic bulletin to its district managers, as follows:

> "A fictitious dealer tank wagon price will be computed by using the retail price, excluding tax, that we have established on contract sales operation less 23%. For example, if we are on contract sales operation at 26.9, the fictitious dealer tank wagon price for use by the distributor would be 13.8. This is the price which we would expect distributors to charge their dealers within the area where we are on contract sales operations * * *".

If a wholesaler sold to a dealer at the "fictitious dealer tank wagon price" under certain conditions prescribed and enforced by the respondent, he would, upon application to respondent, be rebated two-thirds of the difference between the price he charged the dealer and what would be a normal dealer price. He was required to absorb the remaining one-third. The conditions prescribed by the respondent for a wholesaler to meet in order to secure his rebate, were:

(1) They must sell the fictitious or reduced dealer tank wagon prices to those retail dealers located in a depressed or price-war area.

(2) They must furnish respondent evidence of such sale in an application for the rebate on forms previously supplied to them by the respondent. On these forms, they must indicate the dates, gallonage sold and list the dealers to whom they gave the rebate.

(3) Upon receipt of the forms, the respondent calculated the amount of the rebate and remitted to the distributor, but only for the number of gallons sold to those dealers who had resold at respondent's fixed

retail price established for its consignment lessee-dealer stations. The distributor had to sustain the full loss for sales to those dealers for whom the respondent disallowed the rebate.

The way in which respondent's pricing plan worked with distributors is indicated by the experience of the Atlantic Oil Company of Georgetown, Delaware, one of respondent's distributors in Sussex County, Delaware. Charles B. Marsh, the witness representing this distributor, testified that the company had around 18 dealer customers. During the price wars in Sussex County in 1957, respondent assisted the Atlantic Oil Company in aiding the latter's dealers by granting refunds (in effect a lower tank wagon price) on sales. Atlantic Oil Company sold its dealers at a reduced price and in turn applied to the respondent for refunds based on the dealer assistance.

These compensatory refunds were granted by the respondent to Atlantic Oil Company on the understanding, the evidence shows, that the distributor would lower its prices to dealers and that the dealers in turn would post pump prices suggested by the respondent.

Mr. Marsh testified that J. White, an employee of respondent, checked on the pump prices of Marsh's dealers and reported this information to Marsh. This same employee also accompanied Marsh on inspection tours of Marsh's dealers. At such times White asked the dealers to raise their price to the figure recommended by respondent. Most of Marsh's dealers posted uniform pump prices during the 1957 price wars but there were four notable hold-outs. These were: Bunting, Frankfort, Delaware; Burton, Georgetown, Delaware; R. J. Campbell, Frankfort, Delaware; and McGee & West, Somerville, Delaware. When these dealers refused to sell at the pump prices

specified by respondent, Atlantic Oil Company was denied compensatory refunds on transactions with them. This is revealed by the testimony as well as documentary evidence.

Various employees of respondent, such as Mr. White and Mr. Hughes, contacted Witness Marsh about the four nonconforming dealers and insisted that they raise their prices. Mr. White recommended as possible action against these dealers, if they refused to conform to the recommended prices, that Marsh take out their pumps and insignia. Marsh was also threatened with the loss of his franchise if he did not bring these dealers into line. Mr. Zinn, District Sales Manager of respondent, requested from Marsh and received the contracts that this distributor had with such dealers. Mr. Marsh testified that the explained purpose of obtaining the contracts was to see if they could be broken. However, no such action was taken. The four recalcitrant dealers all thereafter raised their prices, although some did this only as a temporary measure and shortly returned to their prior prices.

* * * * *

As aforestated, the hearing examiner dismissed Counts I and II of the complaint, dealing with the consignment program. The dismissal is based upon his belief that the decision of the Supreme Court in *United States* v. *General Electric Co.* (272 U.S. 476, 1926), "legally gives the respondent control over the prices at which its gasoline is sold through its dealers and lessee-dealers, to the consuming public."

Before embarking on a discussion of this phase of the hearing examiner's decision, it must be clearly understood that the Commission, by discussing consignment separately, is not adopting and endorsing

the seriatim treatment afforded this matter by the hearing examiner. The Commission considers the respondent's consignment program to be an integral and inseparable part of its overall pricing policy. In restraint of trade matters, and particularly those involving conspiracies, the legality of conduct is not to be judged by dismembering the evidence and viewing it as separate and distinct entities. *United States* v. *Patten,* 226 U.S. 525, 554 (19); *American Tobacco Co., et al.* v. *United States,* 147 F. 2d, 93, 106 (6th Cir. 1944). Separate discussion is here afforded the consignment plan solely because of the unique and separate defense entered with respect to it.

The obvious point of departure in any discussion involving price fixing is *Socony-Vacuum Oil Co.* v. *United States* (310 U.S. 150, 222–223 [1940]) wherein it was held that any device which has the purpose and effect of fixing prices is an illegal restraint of trade. It is illegal, per se, without regard to whether prices were actually fixed or whether the device was completely unsuccessful in that regard. It is the act of conspiracy or combination itself which is unlawful, and no further showing need be made.

Without doubt this record shows that respondent did agree, conspire and combine with its lessee-dealers through the medium of this consignment program to fix and stabilize the consumer price of gasoline in the area under consideration. Under the *Socony-Vacuum* doctrine such a course of action is clearly unlawful unless the respondent is afforded shelter within the aegis of the *General Electric* case. It is the Commission's view that *General Electric* does not afford the respondent the needed shelter and that the hearing examiner's contrary finding that it does was in error, and must be reversed.

There is a clearcut distinction between the facts presented by the *General Electric* litigation and the instant matter. During the period prior to 1926, General Electric had managed to purchase all of the outstanding patents necessary for the manufacture of incandescent lamps. It, in turn, licensed other corporations, including competitors such as Westinghouse, to manufacture and sell lamps produced through the General Electric patent. All licensees were required to adhere to an agency-type distribution plan set up by General Electric, and were permitted to sell only at the prices set by General Electric.

In 1924 the government filed a petition against General Electric and others charging that the agency system of lamp marketing employed by them was violative of the Sherman Act. The case was tried in 1925 in the United States District Court for the Northern District of Ohio, and the Government's petition was dismissed (15 F. 2d 715). This decision was appealed to the Supreme Court, which in 1926 affirmed the District Court (272 U.S. 476). The Supreme Court decided that the agency method of distribution employed by the defendant was in fact a valid agency and not a disguised purchase-and-sale arrangement, and that General Electric as the owner of the patent, entirely controlling the use and sale of incandescent lamps, was within its rights in imposing upon its licensees conditions that their sales should be at prices fixed by General Electric.

As we see it, there is a wide difference between General Electric's permanently implemented and universally applied agency distribution of products produced under its patent and the activity of the respondent as demonstrated by this record. In this case, respondent attempted to make its dealers genuine

agents, but the change made was merely of form and not of substance. Dealers continued to operate their businesses after entering into consignment agreements in practically the same manner as before, except that they could not determine their own gasoline resale prices to consumers. They commingled money from the sale of gasoline with their receipts from the regular sale of products other than gasoline. They continued to hold themselves out as full proprietors of their stations. They received gasoline and paid out money for its value, and they then sold it at retail as before.

A dealer entering the consignment program did not receive actual payment for his gasoline inventory. The value of the gasoline was put into an escrow account. If more gasoline was needed to bring the dealer's inventory up to the pre-determined consignment level, the dealer also paid for this, and this sum was put into escrow. When the inventory was replenished, the dealer supposedly was paying for gasoline already sold, but in actual fact he was paying for gasoline delivered at the time of payment.

Unlike General Electric, the agency distribution program was not respondent's regular method of selling its products. The system is only used at irregular intervals and in certain markets during price wars. The temporary nature of the program and the shifting back and forth of customers from dealer status to so-called agency status, emphasizes that the consignment plan is a device to fix and stabilize prices, rather than a good faith marketing method.

Furthermore, decisions subsequent to the *General Electric* case have made it clear that where the antitrust acts are involved, the crucial fact is the impact of the particular practice upon competition, not the label it carries. For example, in *United States* v.

Masonite Corp., the Supreme Court held that the result must turn not on the skill with which counsel has manipulated the concept of "sale" and "agency", but on the significance of the business practices in terms of restraint of trade (316 U.S. 265, 280; 1942). Judge Yankwich, in *United States v. Richfield Oil Corp.*, 99 F. Supp. 280 (U.S.D.C. S.D. Cal. 1951), affirmed per curiam 343 U.S. 922 (1952), stated:

> "We must in each case, get behind the facade which the organization has created, —as did the Supreme Court in the *Masonite* case when it went behind a *del credere* agency, which, at first blush, seemed to be a fiduciary relationship established by the concern for its own purposes, and found, instead, a means for monpolization. The Court did not then hesitate to declare the agency a mere cloak for restraints * * *." (99 F. Supp. 289).

It is apparent from the facts that respondent very clearly desired to stifle price competition among Atlantic dealers and it sought the complete control of Atlantic retail prices in the price war area. Respondent utilized the consignment system of marketing as a device to control prices admittedly to avoid the impact of the Clayton and Sherman Acts. Doubtless the respondent felt that it had devised a consignment program valid in that it met all of the criteria of consignment as prescribed in the law of agency and it may well be that for purposes other than anti-trust law enforcement this consignment program could be upheld. But, as here employed, to effect and participate as an integral unit of a horizontal and vertical price fixing scheme, the respondent's consignment program must be held as a violation of the Federal Trade Commission Act.

Insofar as Count III of the complaint alleging a conspiracy involving respondent and its wholesale distributors is concerned, we agree with the hearing examiner's finding that this Count has been sustained. In *United States* v. *Bausch & Lomb Optical Co., et al,* 321 U.S. 707, 723 (1944) the Court said: "Whether this conspiracy and combination was achieved by agreement or by acquiescence of the wholesalers coupled with assistance in effectuating its purpose is immaterial." See also *United States* v. *Parke, Davis & Co.,* 362 U.S. 29 (1960). Here the participation of distributors in the scheme is shown. Distributor Marsh cooperated by following the procedures established by respondent for the fixing and the control of prices. Marsh also accompanied respondent's representatives on inspection tours of dealers' stations for the purpose of influencing such dealers to follow respondent's recommended resale prices. That this was effective is shown by the fact that four recalcitrant dealers changed their prices following such visits, although only temporarily in some cases. Such was aquiescence by the distributor in the illegal scheme coupled with assistance in effectuating its purpose. The hearing examiner found that distributor Marsh was an unwilling conspirator, but that fact is no defense where the party actually participates in the conspiracy. See *United States* v. *Line Material Co.,* 333 U.S. 287 (1948). There is also evidence of the participation of distributor Lister. Thus, a combination or conspiracy to maintain resale prices was organized in violation of the Federal Trade Commission Act.

The consignment agreement arrangement was an integral part of the plan to fix and maintain resale price levels in the price war areas in the "Delmarva

Peninsula". Through such agreements respondent was able to generally maintain a uniform level of prices on sales made through its dealers. This uniformity along with the actions resulting in the fixing of prices on gasoline sold to dealers buying through distributors gave to the respondent general control of price levels among dealers dispensing Atlantic gasoline in the affected areas. The consignment agreements are unlawful as a part of the whole unlawful course of conduct. They were essential to the success of the price fixing scheme just as it was necessary to the success of the venture for the dealers buying through distributors to maintain recommended prices. Where the whole course of conduct is illegal, specific practices, although in themselves lawful, may be prohibited as part of the illegal whole. Cf. *United States* v. *Bausch & Lomb Optical Co., et al.*, 321 U.S. 707 (1944). In the matter of *Snap-On-Tools Corporation*, Docket No. 7116 (Decision of the Commission, November 1, 1961). We hold in the circumstances that respondent is in violation of the law as charged in Counts I, II, and III of the complaint.

Respondent argues that its practices which the examiner found to be unlawful were not in interstate commerce. The position taken is that the commerce involved in the sale of gasoline at wholesale and at retail, with which the acts and conspiracies charged in the complaint are concerned, were purely local sales and not in interstate commerce. Section 5 prohibits unfair methods of competition in (interstate) commerce and unfair or deceptive acts or practices in (interstate) commerce. Our determination of the question turns on whether or not the course of conduct found to be unfair has been engaged in in interstate commerce.

Respondent clearly does business in interstate commerce and the gasoline involved in the resale price maintenance scheme moved in interstate commerce. Respondent shipped its gasoline from its refineries through terminal centers in Norfolk, Virginia, Newark, New Jersey, and its bulk distribution centers in Salisbury, Maryland, and Wilmington, Delaware, to storage tanks maintained by distributors, and lessee-dealers in the "Delmarva Peninsula". Respondent, with main offices in Philadelphia, Pennsylvania, and with its regional office covering the "Delmarva Peninsula" area in East Reading, Pennsylvania, entered into sales contract agreements with lessee-dealers in several states, including Delaware and Maryland.

The methods and practices used by respondent in obtaining the acquiescence and cooperation of its wholesale distributors in the price fixing scheme and their assistance in effectuating its purpose were engaged in in [sic] interstate commerce. The parties themselves, that is, respondent on the one hand and distributors on the other, were located in different states and contracts between them involved interstate commerce. Various documents used to carry out the scheme were transmitted across state lines. For instance, requests for refunds by distributors for dealer assistance were made on forms sent to Reading, Pennsylvania. Other evidence of the interstate character of the transactions relating to the price fixing scheme includes correspondence, bulletins and other matter which moved across state lines.

Thus, there was a transaction or a scheme of an interstate character, regardless of the nature of the commerce involved in the local distribution of the gasoline. Cf. *Holland Furnace Company* v. *Federal Trade Commission,* 269 F. 2d 203 (7th Cir. 1959), *cert. denied* 361 U.S. 932; *General Motors Corpora-*

tion, et al. v. *Federal Trade Commission,* 114 F. 2d 33 (2nd Cir. 1940); *Ford Motor Company* v. *Federal Trade Commission,* 120 F. 2d 175 (6th Cir. 1941) *cert. denied* 314 U.S. 668; *United States* v. *Food and Grocery Bureau of Southern California,* 43 F. Supp. 966 972 (U.S.D.C. S.D. Cal. 1942). We hold, therefore, that the methods of competition, acts and practices herein found to be unfair were engaged in in "commerce" within the meaning of that term as used in the Federal Trade Commission Act.

The Commission is fully aware of the difficulties faced by tradesmen at all levels of commerce when price wars erupt in the sale of gasoline. It is realized that efforts often are made by some suppliers to cooperate with and assist their dealers in various ways so as to enable them to compete in the course of price wars. However, in doing so they should avoid transgressions of the antitrust laws. A seller may apply to the Commission for advice on appropriate, legal methods for meeting the problem in the particular circumstances it faces. The solution, we are sure, does not lie in the use of price fixing schemes violating the antitrust laws. Respondent here cannot justly claim that it was acting only in self-defense or the defense of its dealers since its course of conduct went beyond any such objective and reached into the area of unlawful price fixing. Such conduct we must condemn. Even if respondent had proceeded from entirely good motives, that circumstance would be no justification here for the infractions of law disclosed. *Fashion Originators Guild of America, Inc. et al.* v. *Federal Trade Commission,* 312 U.S. 457 (1941); *Paramount Famous Lasky Corporation, et al.* v. *United States,* 282 U.S. 30, 44 (1930).

The examiner found in the initial decision that on the forms for refunds on dealer assistance the distributors indicate "the dates and total gallonage sold at the reduced price and a list of the dealers to whom they gave the rebate." This appears to be incorrect and, while it is not a crucial finding, we believe it should be changed. The words "total" and "sold at the reduced price" will not be adopted as part of the Commission's findings.

The exceptions to the initial decision of respondent are rejected and the exceptions of counsel supporting the complaint are sustained to the extent indicated. An appropriate order will be entered.

Commissioner Elman does not concur.

Commissioners Anderson and Higginbotham did not participate in the decision of this matter, the former for the reason that he did not hear oral argument, and the latter by reason of the fact that this matter was argued before the Commission prior to the time he was sworn into office.

MAY 16, 1963.

United States of America

Before Federal Trade Commission

COMMISSIONERS:
Paul Rand Dixon, *Chairman*
Sigurd Anderson
Philip Elman
Everette MacIntyre
A. Leon Higginbotham, Jr.

Docket No. 7471

IN THE MATTER OF THE ATLANTIC REFINING COMPANY, INC., A CORPORATION

Order Partially Adopting Initial Decision and Providing for the Filing of Objections to Proposed Order and Reply

The Commission having rendered its decision in part allowing and in part disallowing complaint counsel's exceptions to the initial decision and disallowing all of respondent's exceptions thereto:

IT IS ORDERED that the Findings of Fact numbered I through IX of the Initial Decision be and hereby are adopted as the Findings of the Commission, excepting that the words "total" and "sold at the reduced price" in item numbered (2) of part VII thereof are incorrect and are not adopted. Those parts of the initial decision not expressly adopted are set aside and do not constitute part of the decision of the Commission.

IT IS FURTHER ORDERED that respondent may, within twenty (20) days after service upon it of this

order and the attached Opinion of the Commission, file with the Commission its exceptions to the Proposed Final Order herein set out, a statement of its reasons in support thereof, and a proposed form of order appropriate to the Commission's decision; and that counsel supporting the complaint may, within ten (10) days after service of respondent's exceptions, file a statement in reply thereto, supporting the Proposed Final Order.

IT IS FURTHER ORDERED that if no exceptions to the Commission's Proposed Final Order are filed within twenty (20) days, the said Order shall then become the Final Order of the Commission.

Proposed final order

IT IS ORDERED that the respondent, The Atlantic Refining Company, a corporation, its officers, directors, agents, representatives, or employees, directly or through any corporate or other device in, or in connection with, the offering for sale, sale, or distribution of gasoline, in commerce as "commerce" is [sic] defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

1. Entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, arrangement, agreement, contract or conspiracy with any person or persons not parties hereto, to establish, fix, adopt, maintain, adhere to, or stabilize by any means or method, prices, terms or conditions of sale at which its gasoline is to be sold.

2. Establishing, maintaining, continuing, cooperating in, or carrying out, or attempting so to do, any plan, policy, program, or any consignment policy in combination with any other person or persons not parties hereto, for the purpose or with the effect of enabling respondent to establish or fix the prices,

terms or conditions of sale at which its gasoline is to be resold by a dealer after purchase from respondent.

3. Coercing, persuading, inducing, or otherwise unduly influencing, directly or indirectly, its independent wholesale distributors to enter into, cooperate in, or carry out any planned common course of action, understanding, arrangement, agreement, combination, or conspiracy to establish, fix, stabilize, maintain, or adhere to, by any means the wholesale price at which gasoline is sold by said wholesale distributors or the retail prices at which gasoline is to be resold by retail service stations owned and operated by said distributors and retail dealer customers of said wholesale distributors.

Provided, However, that nothing herein contained shall be construed to limit or otherwise affect any resale price maintenance contracts which respondent may enter into in conformity with Section 5 of the Federal Trade Commission Act, as amended by the McGuire Act (Public Law 542, 82nd Cong. 2nd Sess., approved July 14, 1952).

By the Commission, Commissioner Elman not concurring, and Commissioners Anderson and Higginbotham not participating, the former for the reason that he did not hear oral argument, and the latter by reason of the fact that this matter was argued before the Commission prior to the time when he was sworn into office.

JOSEPH W. SHEA
Joseph W. Shea,
Secretary.

ISSUED: May 16, 1963

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 558

THE ATLANTIC REFINING COMPANY, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR REHEARING

EDWARD F. HOWREY
Attorney for Petitioner.

ROY W. JOHNS
General Counsel

THE ATLANTIC REFINING COMPANY
260 South Broad Street
Philadelphia, Pennsylvania

Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OCTOBER TERM, 1965

No. 558

THE ATLANTIC REFINING COMPANY, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR REHEARING

Petitioner prays that this Court (1) grant rehearing of its order of December 6, 1965, denying the petition for writ of certiorari, and (2) issue a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit in this case as prayed for in the petition filed herein on September 10, 1965.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

Petitioner, The Atlantic Refining Company, in its petition for certiorari filed September 10, 1965, sought review of the judgment of the Court of Appeals for the Sixth Circuit which held (relying on *Simpson* v.

Union Oil Co., 377 U.S. 13 (1964)) that Atlantic's use of the consignment method of distribution in the retail sale of gasoline is illegal under the antitrust laws. On the same day that this Court denied the petition for a writ of certiorari herein, namely, December 6, 1965, it noted probable jurisdiction and agreed to review the decision of the District Court for the Northern District of Illinois in *United States* v. *Arnold, Schwinn & Co.*, No. 611, appeal filed September 24, 1965, which involves the same issue of law presented by Atlantic's petition. In addition, a petition for a writ of certiorari raising the same question is now pending before this Court in another case, *Sun Oil Co.* v. *Federal Trade Commission*, No. 749, petition filed November 17, 1965.

In its jurisdictional statement in *United States* v. *Arnold, Schwinn & Co., supra,* the second question presented by the Government involves the legality of the use of an "agency" or "consignment" method of retail distribution by Schwinn. The Government maintains that the District Court's holding that this distribution method was lawful "is contrary to the recent decision in *Simpson* v. *Union Oil Co.*, 377 U.S. 13, where the Court held that consignment could not be used to fix resale prices on a broad scale in gasoline distribution . . ." (Jurisdictional Statement, p. 19).

The petition in *Sun Oil Co.* v. *Federal Trade Commission, supra,* also raises the question of the legality of consignment selling and the applicability of the *Simpson* holding to that case. The *Sun* case, indeed, presents a factual situation similar in important aspects to that involved in this case.

Manifestly, it would be most appropriate for this Court to grant review in the *Atlantic* case in view of

the fact that it has already accepted review of the same issue in the *Schwinn* case, and has before it the same issue in the pending petition of Sun Oil Company. The acceptance of all three cases raising this issue would give the Court an opportunity to settle and clarify the conflicting lower court decisions interpreting the *Simpson* holding on the use of consignment selling in marketing. These circumstances provide grounds for granting this petition for rehearing. See, *e.g., Pickett* v. *Union Terminal Co.,* 313 U.S. 591, 314 U.S. 704, 315 U.S. 386, 394; *Bowden* v. *City of Fort Smith,* 316 U.S. 584, 589.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, it is respectfully urged that rehearing be granted, that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Sixth Circuit, and that all three of the above cases be set for consolidated hearing insofar as they present the same basic issue of law.

Respectfully submitted,

EDWARD F. HOWREY
Attorney for Petitioner.

ROY W. JOHNS
General Counsel

THE ATLANTIC REFINING COMPANY
260 South Broad Street
Philadelphia, Pennsylvania

Of Counsel

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

EDWARD F. HOWREY
Counsel for Petitioner.

Dated: December 29, 1965